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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941 1940

No. 1023

A. J. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ETC., PETITIONER,

vs.

THE UNION TERMINAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 5, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

INDEX.

	PAGE
Caption	1
Complaint	1
Motion of defendant for more definite Statement or Bill of Particulars and to strike portions of complaint	5
Order on defendant's Motion for more definite Statement	6
Notice of defendant to produce certain documents	7
Amended Complaint	9
Answer	22
Second Amended Complaint	26
Final Judgment, entered 5/28/40	39
Motion for New Trial	42
Brief in Support of Defendant's Motion for New Trial	46
Plaintiff's Brief in Opposition to Defendant's Motion for New Trial	87
Application of defendant for leave to amend and file Counterclaim	104
Exhibit "A"—Amended Answer and Counterclaim of defendant	106
Order overruling Defendant's Application for leave to amend and exception thereto	112
Amended Motion for New Trial	113
Order overruling Amended Motion for New Trial and exception of deft. thereto	117
TRANSCRIPT OF EVIDENCE	118
Statement made by Mr. Flanagan Counsel for Plaintiff	119
Statement made by Mr. Payne Counsel for Defendant	122

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Agreed Statement of Facts 123
Evidence for Plaintiff:
Exhibit "A"—The Union Terminal Company Working Agreement between The Union Terminal and Brotherhood of Railway Clerks and Steamship Clerks, etc. 134
Exhibit "B"—The Union Terminal Company Red Cap Time Slip 135
Exhibit "C"—The Union Terminal Company Time Slip 136
Exhibit "D"—The Union Terminal Company Time Slip of Red Cap 136
Exhibit "E"—Baggage Check 136
Exhibit "F"—Introduction of Letter, The Union Terminal Co., to Red Caps, The Union Terminal Co., dated 10/22/38 137
Exhibit "G"—Employees Application for Transportation 137
Exhibit "H"—Letter addressed to The Union Terminal Co., Dallas, Texas, and signed by each of the Red Caps involved in this suit, dated 10/11/38 139
Exhibit "I"—Letter, A. J. Pickett, General Chairman to Murrell L. Buckner, Vice-Pres. and Genl. Mgr., The Union Terminal Co., dated 10/11/38 142
Exhibit "J"—Letter, A. J. Pickett to Murrell L. Buckner, Vice-Pres. and Genl. Mgr., The Union Terminal Co., dated 12/26/38 143

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Agreed Statement of Facts—(Continued):
Evidence for Plaintiff—(Continued):
Exhibits marked "J-1" to "J-5" inclusive—Proposed Agreement between The Union Terminal Co. and Its Red Caps, Ushers, Attendants and all others engaged in handling hand baggage to and from passenger trains, etc. 144
Exhibit "K"—Letter, A. J. Pickett, to Murrell L. Buckner, dated 10/5/39 152
Exhibit "L"—Letter, Murrell L. Buckner to A. J. Pickett, dated 10/6/39 ... 152
Exhibit "M"—Letter, Murrell L. Buckner to A. J. Pickett, dated 12/6/39 ... 153

Exhibit "N"—Certificate of Secretary of Interstate Commerce Commission, dated 5/22/40 154
Notice of the Commission, dated 12/20/37 154
Findings and Order of the Interstate Commerce Commission, dated 10/18/37 with Questionnaire 155
Order of Interstate Commerce Commission dated 12/14/37 extending time for filing returns to 1/4/38 164

Exhibit "O"—Certificate of Secretary of Interstate Commerce Commission, dated 4/29/40 166

INDEX—Continued

	PAGE
Transcript of Evidence—(Continued):	
Agreed Statement of Facts—(Continued):	
Evidence for Plaintiff—(Continued):	
Exhibit "O"—Continued):	
Order of Interstate Commerce Commission, dated 10/16/37	167
Return to Questionnaire, filed 1/-10/38, by The Union Terminal Company	168
Exhibit "P"—Certificate of Secretary of Interstate Commerce Commission, dated 4/30/40	176
Report of the Commission	178
Findings and Order of Interstate Commission, dated 9/29/38	194
Exhibit "Q"—Time Table No. 123, dated 7/23/39	195
Testimony of D. W. Estes	196
L. H. Akers	198
Jim Foster (Colored)	201
Colloquy between Court and Counsel	213
Exhibit (not marked)—Statement showing Wages and Balances, Hours, Rate, etc.	215
Oral Opinion of the Court	276
Written Opinion of the Court, dated 5/28/40	281
Notice of Appeal	291
Appellant's Concise Statement of Points on which to rely on Appeal	292
Supersedeas Bond	296
Appellant's Designation of Contents of Record on Appeal	298
Clerk's Certificate	299

INDEX—Continued

	Page
Proceedings in U. S. C. C. A., Fifth Circuit	300
Minute entry of argument and submission	300
Opinion, Sibley, J.	301
Dissenting opinion, Holmes, J.	303
Judgment	304
Petition for rehearing (omitted in printing)	305-309
Order denying rehearing	310
Application for stay of mandate	310
Order staying issuance of mandate	311
Order allowing certiorari	312

CAPTION.

BE IT REMEMBERED, that at a regular term of the United States District Court in and for the Northern District of Texas, begun and holden at Dallas, Texas, on the 6th day of May, A. D. 1940, and which said term of Court is now in session, the Honorable William H. Atwell, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

A. J. PICKETT, General Chairman of the Brotherhood, of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

Plaintiff,

versus No. 248-Civil.

THE UNION TERMINAL COMPANY, a corporation,

Defendant.

2

COMPLAINT.

Filed March 7, 1940.

(Title Omitted.)

I.

Jurisdiction in this case is conferred upon this Court under Section 41 (8) of Title 28 of the United States Code

for the reason that this suit is a civil action at law arising under a law of the United States regulating Interstate Commerce since it arises under the statute of the United States enacted June 25, 1938, and entitled The Fair Labor Standards Act of 1938 (Chapter 676, Section 1, 52 Stat. 1060).

II.

Plaintiff, A. J. Pickett, states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees and is the duly authorized representative and attorney in fact of the hereinafter named persons designated herein as employees of the defendant, and plaintiff states that he has been duly authorized by each of the hereinafter named persons to bring this action in their behalf as provided for in Section 16, Paragraph B of the Fair Labor Standards Act of 1938 as referred to in paragraph One of this complaint. Plaintiff further states that the defendant is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas, used and necessary in the transportation of persons and

3 property in Interstate Commerce; that at its said terminal defendant employs and at all times since October 24, 1938, has employed Issac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingworth, J. T. Turpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Chas. Langston, Chas. Mackleroy, Filex Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, William McMurray, Sam H. Williams, Ernest Amos, Harry Barton, Adolphus Wells, Alfonso Con-

nor, Lawrence McNeil, Carnelius Busby, Columbus Jackson, Everet Matthews, Frank Southern, James Foster, Scott Campbell, who are commonly known as red caps in the handling of hand-baggage and travelling effects for passengers and otherwise assisting their passage through said terminal; that substantially all the passengers assisted by said red caps were and are in transit to and among the several states of the United States; that during the work-week beginning October 24, 1938, and continuing to the date hereof defendant at its said terminal in Dallas, Texas, has employed and is employing the aforesaid employees in Interstate Commerce, and that the services so performed by the aforesaid employees and defendant were during all of said time and now are an essential part of the transportation of passengers and property among the several states of the United States, and that said employees and defendant while performing such services were during all said time and now are engaged in commerce among the several states of the United States.

III.

Under the terms and provisions of the Fair Labor Standards Act of 1938, Section 6 (29 U. S. C. A. 206; 52 Stat. 1060), defendant was required to pay to each of the aforesaid employees wages at the rate of not less than 25c an hour from October 24, 1938, to October 23, 1939, and not less than 30c an hour from and after October 24, 1939.

IV.

Notwithstanding the requirements of said Fair Labor Standards Act of 1938, defendant has failed and refused to pay the aforesaid employees or any of them the sum of 25c an hour from October 24, 1938, to October
4 23, 1939, and the sum of 30c an hour from and after October 24, 1939, to the date hereof, and

has paid the aforesaid employees no wages as such at all from October 24, 1938, to the date hereof.

That each of the aforesaid employees has from October 24, 1938, to October 23, 1939, worked a total of 2920 hours for defendant as a red cap, as aforesaid, for which each of the aforesaid employees is entitled to wages in the sum of Seven Hundred Thirty Dollars ($730.00), and that each of the aforesaid employees has since October 24, 1939, to the date hereof worked a total of 1072 hours, for which he is entitled to wages in the sum of Three Hundred Twenty-one Dollars and Sixty Cents ($321.60); that there is now due and owing from defendant to each of the aforesaid employees for wages from October 24, 1938, to the date hereof the sum of One Thousand Fifty-one Dollars and Sixty Cents ($1,051.60).

Wherefore, plaintiff prays that judgment be entered herein against defendant in favor of each of the aforesaid employees for the sum of One Thousand Fifty-one Dollars and Sixty Cents ($1,051.60) for the amount of the unpaid minimum wages due him, and for an additional equal amount as liquidated damages, and that the Court further allow a reasonable attorney's fee to be paid by defendant and for the costs of this action.

CHAS. M. HAY & S. D. FLANAGAN,
Attorneys for Plaintiff.

506 Olive Street,
St. Louis, Missouri.

MOTION OF DEFENDANT FOR MORE DEFINITE STATEMENT AND TO STRIKE.

Filed March 28, 1940.

(Title Omitted.)

The defendant moves the Court as follows:

I. To require:

(a) That Plaintiff file herein a more definite statement or a bill of particulars wherein will be set forth the following:

1. A definite statement of the contract or agreement of employment of the redcaps named in the complaint and whether oral or in writing.

2. The total amounts which each of the parties hereto and each of the persons on whose behalf this action may be deemed to have been brought has received for his services as such red cap at or near the station of Defendant for each pay period from October 24, 1938 to
6 October 23, 1939 and from October 24, 1939 to the date of filing the complaint, including the amounts that each red cap has received from all sources during said time for his services as a red cap at or near said station, including tips or compensation received by him.

3. The total amounts which each of said red caps has received directly from Defendant for his services at or near the station of Defendant.

II. To strike from the complaint the following immaterial and irrelevant matters:

(a) That part of Paragraph II of the complaint reading as follows:

"Plaintiff A. J. Pickett states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks Freight Handlers, Express and Station Employees."

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
JOHN C. ROBERTSON,
GUS M. HODGES,
Attorneys For Defendant.

505 Republic Bank Building,
Dallas, Texas.

The foregoing motion was served upon said Plaintiff in said action by mailing a copy thereof by U. S. Mail on this 26th day of March A. D. 1940.

GUS M. HODGES,
Attorney For Defendant.

ORDER ON DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT.

7 Filed May 9, 1940.

On This the 6th day of May, 1940, came on to be heard the defendant's motion for more definite statement and to strike, and upon due hearing the Court ruled as follows:

Sub-paragraph 1 of paragraph I, is sustained to the extent of requiring plaintiff to allege whether said contract agreement is oral or in writing and is otherwise overruled.

Sub-paragraph 2 of paragraph I, is sustained to the extent of requiring plaintiff to set out tips or compensation received by each of the persons for whom this suit is brought during the period from March 1939 to October 1939, and is otherwise overruled.

Sub-paragraph 3 of Paragraph I is overruled.

Paragraph II is overruled.

Plaintiff shall amend within the time required by law and thereafter defendant shall answer within the time required by law.

WM. H. ATWELL,
U. S. Dist. Judge.

OK as to form:
S. D. FLANAGAN,
GUS M. HODGES.

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8 NOTICE TO PRODUCE.

Filed May 3, 1940.

To the above-named defendant, Robertson, Leachman, Payne, Gardere and Lancaster, John C. Robertson and Gus M. Hodges, its attorneys of record:

You are hereby requested to produce at the trial of the above-entitled cause, which is set for hearing on May 6, 1940, and at any later date on which said cause may be called for trial, the following papers and documents:

I. Original signed working agreement, dated January 1, 1940, between the Union Terminal Company and the Brotherhood of Railway and Steamship Clerks, Freight

Handlers, Express and Station Employees, covering red caps employed by the Union Terminal Company;

2. Payroll records of the Union Terminal Company, showing the hours worked by, wages earned by, wages paid to, and tips reported by the red caps employed by the Union Terminal Company at its passenger station at Dallas, Texas, for the period from October 24, 1938, to March 31, 1940, inclusive, and records of said company, showing tips reported by said red caps to said company for each day from March 1 1940, to March 6, 1940, inclusive, and hours worked by said red caps each day from March 1, 1940, to March 6, 1940, inclusive.

3. Letter from A. J. Pickett, General Chairman of the Union Terminal Company System Board of Adjustment, dated October 24, 1938, addressed to Mr. Murrell L. Buckner, Vice-President and General Manager of the Union Terminal Company, Dallas, Texas, protesting on behalf of the red cap employees of said company against the accounting and guaranteee system proposed by said company in its notices to its red cap employees, dated October 22, 1938.

9 You are further notified that unless the foregoing papers and documents are produced in compliance with this notice, secondary evidence will be used to prove the contents of the same.

CHARLES M. HAY,
S. D. FLANAGAN,
W. I. SAVAGE,
Attorneys for Plaintiff.

Service of a copy of the foregoing notice to produce on us is acknowldeged, this 3rd day of May, 1940.

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
GUS M. HODGES,
Attorneys for defendant.

10 AMENDED COMPLAINT.

Filed May 9, 1940.

(Title Omitted.)

I.

Jurisdiction of this cause is conferred upon this Court by Section 41 (8) of Title 28 of the United States Code for the reason that this suit is a civil action at law arising under a law of the United States regulating interstate commerce since it arises under the statute of the United States enacted June 25, 1938, entitled "The Fair Labor Standards Act of 1938" (Chapter 676, Section 1, 52 Stat. 1060).

II.

Plaintiff A. J. Pickett states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees, and is the duly authorized representative and attorney in fact of the hereinafter named persons designated herein as employees of the defendant, and that he has been duly authorized by each of the hereinafter named persons to bring this action in their behalf, as provided for in Section 16, Paragraph (b), of the Fair Labor Standards Act of 1938.

11 III.

Plaintiff further states that the defendant is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad teminal and terminal facilities in the City of Dallas, Texas, used and

necessary in the transportation of persons and property employs and at all times since October 24, 1938, has employed James Foster, Isaac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingsworth, J. T. Turpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Charles Langston, Charles Muckleroy, Felix Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, Willam McMurray, Sam H. Wiliams, Ernest Amos, Harry Barton, Adolphus Wells, Alphonso Connor, Lawrence McNeil, Cornelius Busby, Columbus Jackson, Everett Mathews, Frank Southern, Scott Campbell, H. N. Barton, Silas Kelton, Frank Bailey and Russell Elston, who are commonly known as red caps, to handle hand baggage and traveling effects of passengers and otherwise to assist their passage through said terminal; that substantially all the passengers assisted by said red caps were and are in transit to and among the several states of the United States; that during the work week beginning October 24, 1938, and continuing to the date hereof defendant at its said terminal in Dallas, Texas, has employed and is employing the aforesaid employees in interstate commerce, and that the services so performed by the aforesaid employees and defendant were during all of said time and now are an essential part of the transportation of passengers and property among the several states of the United States, and that said employees and defendant while performing such services were during all said time and now are engaged in such transportation, and in commerce among the several states of the United States.

12 IV.

Under the terms and provisions of the Fair Labor Standards Act of 1938, Section 6 (29 U. S. C. A. 206, 52

Stat. 1060), defendant was required to pay to each of the aforesaid employees wages at the rate of not less than Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23, 1939, and not less than Thirty Cents ($.30) an hour from and after October 24, 1939.

V.

Notwithstanding the requirements of said Fair Labor Standards Act of 1938, defendant has failed and refused to pay the aforesaid employees or any of them the sum of Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23, 1939, and the sum of Thirty Cents ($.30) an hour from and after October 24, 1939, to the date of the filing of this suit, but has paid said employees only a small part of said wages; that the following table shows in detail as to each of said employees the hours worked during the period from October 24, 1938, to October 23, 1939, the amount of wages earned at Twenty-Five Cents ($.25) per hour during said period, the hours worked during the period from October 24, 1939, to March 6, 1940, the amount of wages earned at Thirty Cents ($.30) per hour during said period, the total wages earned from October 24, 1938, to March 6, 1940, the total of the amount paid by defendant to each of said employees as wages for said latter period, and the amount paid on his behalf as taxes, and the balance due on the wages earned during said period from October 24, 1938, to March 6, 1940:

			Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Foster, James					
2,818½	hours @ $ .25	$704.56			
1,026	hours @ .30	307.80			
			$1,012.36	$47.20	$965.16
Johnson, Isaac					
2,783½	hours @ $ .25	0695.88			
1,040	hours @ .30	312.00			
			1,007.88	44.86	963.02
Franks, J. C.					
2,899-1/6	hours @ $ .25	$724.00			
1,084-11/12	hours @ .30	325.47			
			1,050.27	36.80	1,013.47
Brigham, J. W.					
2,880	hours @ $ .25	$720.00			
1,080	hours @ .30	324.00			
			1,044.00	29.03	1,014.97
Brooks, Lemuel					
2,832	hours @ $ .25	$708.00			
1,040	hours @ .30	312.00			
			1,020.00	44.62	975.38

Johnson, A. R.				
2,739 hours @ $ .25	$684.75			
1,044 hours @ .30	313.20			
		997.95	46.95	951.00
Jefferson, John				
2,880 hours @ $ .25	$720.00			
1,080 hours @ .30	324.00			
		1,044.00	40.97	1,003.03
Alexander, O. A.				
2,912 hours @ $ .25	$728.00			
1,003-1/6 hours @ .30	300.95			
		1,028.95	44.87	984.08
Jackson, Joe				
2,912 hours @ $ .25	$728.00			
1,036-1/6 hours @ .30	310.85			
		1,038.85	48.25	990.60
McIntosh, Nathan				
2,912 hours @ $ .25	$728.00			
912 hours @ .30	273.60			
		1,001.60	43.20	958.40

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Turner, Nelson				
2,896 hours @ $ .25	$724.00			
1,020 hours @ .30	306.00			
		1,030.00	48.29	981.71
Thomas, Allen				
2,556 hours @ $ .25	$639.00			
1,024 hours @ .30	307.20			
		946.20	39.03	907.17
Williams, Richard				
2,910 hours @ $ .25	$727.50			
1,072 hours @ .30	321.60			
		1,049.10	26.90	1,022.20
Hollingsworth, Ulyssus				
2,661½ hours @ $ .25	$665.38			
1,040 hours @ .30	312.00			
		977.38	54.02	923.36
Turpin, J. T.				
2,240 hours @ $ .25	$560.00			
1,040 hours @ .30	312.00			
		872.00	33.91	838.00

Campbell, Dave				
2,576 hours @ $ .25	$644.00			
884 hours @ .30	265.20			
		909.20	37.58	871.62
Fields, Nelson				
2,556 hours @ $ .25	$639.00			
1,072 hours @ .30	321.60			
		960.60	45.24	915.36
Robertson, C. H.				
2,227½ hours @ $ .25	$556.88			
758 hours @ .30	327.40			
		784.28	40.35	743.93
Hunt, Haywood				
2,872 hours @ $ .25	$718.01			
1,080 hours @ .30	324.00			
		1,042.01	54.12	987.89
Spears, Donald				
2,873-2/3 hours @ $ .25	$718.42			
1,072 hours @ .30	321.60			
		1,040.02	38.19	1,001.83

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Hynson, Clinton				
2,728 hours @ $ .25	$682.00			
1,060 hours @ .30	318.00			
		1,000.00	27.27	972.93
Curry, J. P.				
2,856 hours @ $ .25	$714.00			
1,064 hours @ .30	319.20			
		1,033.20	43.36	989.84
Langston, Charles				
2,690 hours @ $ .25	$672.50			
1,065 hours @ .30	319.50			
		992.00	79.05	916.95
Muckelroy, Charles				
2,880 hours @ $ .25	$720.00			
1,048 hours @ .30	314.40			
		1,034.40	123.92	910.70
Jackson, Felix				
2,904 hours @ $ .25	$726.00			
1,080 hours @ .30	324.00			
		1,050.00	54.10	995.90

Brigham, Paul				
2,801½ hours @ $ .25	$700.38			
984 hours @ .30	295.20			
		995.58	29.80	965.78
May, Arthur				
2,865-2/3 hours @ $ .25	$716.42			
1,050 hours @ .30	315.00			
		1,031.42	63.79	967.63
Jones, Theodore				
1,936 hours @ $ .25	$ 484.00			
736 hours @ .30	220.80			
		704.80	26.33	678.47
Cameron, Tilson W.				
2,160 hours @ $ .25	$340.00			
923 hours @ .30	376.90			
		816.90	37.56	779.34
McMurray, William				
2,752 hours @ $ .25	$688.00			
1,064 hours @ .30	319.20			
		1,007.20	56.38	950.82

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Williams, Sam H.				
472 hours @ $ .25	$118.00			
147-1/6 hours @ .30	44.15			
		162.15	8.48	153.67
Amos, Earnest				
2,860 hours @ $ .25	$715.00			
1,070 hours @ .30	321.00			
		1,036.00	235.46	800.55
Barton, Harry				
2,694½ hours @ $ .25	$673.63			
1,080 hours @ .30	324.00			
		997.63	33.84	963.79
Wells, Adolphus				
2,204 hours @ $ .25	$551.00			
1,056 hours @ .30	316.80			
		867.80	54.02	813.78
Connor, Alphonso				
27,676 hours @ $ .25	$665.00			
1,056 hours @ .30	316.80			
		981.80	44.30	937.50

McNeil, Lawrence				
2,828 hours @ $ .25	$707.00			
1,001 hours @ .30	300.30			
		1,007.30	110.43	899.26
Busby, Cornelius				
992 hours @ $ .25	$248.00			
1,059¾ hours @ .30	317.93			
		565.93	44.25	521.68
Jackson, Columbus				
2,872 hours @ $ .25	$718.00			
1,080 hours @ .30	324.00			
		1,042.00	48.71	993.29
Mathews, Everett				
2,720 hours @ $ .25	$670.00			
990¼ hours @ .30	297.08			
		977.08	35.14	942.24
Southern, Frank				
2,768 hours @ $ .25	$692.00			
1,003¾ hours @ .30	301.13			
		993.13	32.01	961.12
Campbell, Scott				
48 hours @ $ .25	$12.00			
		12.00	3.00	9.00

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Barton, H. N.				
2,753½ hours @ $ .25	$688.38			
1,064 hours @ .30	319.20			
		1,007.58	34.72	972.86
Kelton, Silas				
584 hours @ $ .25	$146.01			
222-1/3 hours @ .30	66.70			
		212.71	15.35	197.36
Bailey, Frank				
1,351 hours @ $ .25	$337.75			
405-11/12 hours @ .30	121.77			
		459.52	17.81	441.71
Ellston, Russell				
2,896 hours @ $ .25	$724.00			
1,081½ hours @ .30	324.45			
		1,048.45	31.51	1,016.94
		40,893.23	2,134.97	38,765.38

VI.

That the amount respectively set opposite the name of each red cap in the column headed "Balance Due" in the above table, was received by each of said red caps as tips from passengers at and about defendant's terminal from October 24, 1938, to March 6, 1940.

VII.

That there is now due and owing to said employees from defendant the total sum of Thirty-Eight Thousand Seven Hundred Sixty-Five Dollars and Thirty-Eight Cents ($38,765.38), being the total minimum wages remaining unpaid for the period from October 24, 1938 to March 6, 1940.

Wherefore, plaintiff prays that judgment be entered herein against defendant in favor of plaintiff for the sum of Thirty-Eight Thousand Seven Hundred Sixty-Five Dollars and Thirty-Eight Cents ($38,765.38), being the amount of the unpaid minimum wages due said employees, as aforesaid, and for an additional equal amount as liquidated damages, and that the Court further allow a reasonable attorney's fee to be paid by defendant, and the costs of this action.

W. T. SAVAGE,
(W. T. Savage)

Dallas, Texas.

CHAS. M. HAY,
(Charles M. Hay)

506 Olive, St. Louis, Mo.

S. D. FLANAGAN,
(S. D. Flanagan)

St. Louis, Mo.

ED. D. FRANEY.

St. Louis, Mo.

DEFENDANT'S ANSWER.

Filed May 17, 1940.

(Title Omitted.)

I.

Defendant denies the allegations of Paragraph I of Plaintiff's Amended Complaint, and shows that the alleged action is not one coming within "The Fair Labor Standards Act of 1938" or of any other law of the United States regulating Interstate Commerce.

II.

As to Paragraph II of Plaintiff's Amended Complaint, defendant admits that A. J. Pickett is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freght Handlers, Express and Station Employees; defendant denies that the "Fair Labor Standard Act of 1938" is applicable to the cause; defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of Paragraph II.

III.

As to Paragraph III of Plaintiff's Amended Complaint, defendant admits that it "is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas"; defendant denies that it employed or had employed the persons named, but says said named persons did work in and around defendant's premises during the times mentioned as red caps, handling the baggage and traveling

effects of persons entering and leaving its premises. Defendant denies all of the allegations of said paragraph except as expressly alleged or explained above.

IV.

Defendant denies the allegations of Paragraph IV of Plaintiff's Amended Complaint.

V.

Defendant denies all of the allegations of Paragraph V of Plaintiff's Amended Complaint, except as hereinafter specifically set out:

(a) Prior to October 24, 1938, the defendant delivered a notice, a copy of which is hereto attached and marked Exhibit "A", to each of the Red Caps set out in Plaintiff's amended complaint and all other Red Caps working in and about defendant's station, notifying them that defendant guaranteed to each of them continuing work as Red Caps after October 24, 1938, that they would receive as compensation not less than the minimum provided by the Fair Labor Standard Act; that said Red Caps should report to defendant the amount of tips and remunerations collected by them each day, and that instead of turning such tips and remunerations in to defendant, said Red Caps should retain all such tips and remunerations subject to being credited upon the guaranteed compensation and subject also to the requirement that each Red Cap pay to defendant the amount of taxes imposed by law upon such Red Cap and required by law to be collected by defendant.

(b) Thereafter pursuant to such notice the Red Caps and each of them reported each day to defendant the number of hours worked and the amount of tips and remunera-

tion collected; and such Red Caps were allowed to and did retain for their own use and benefit all such tips and remunerations collected by them while working about defendant's premises instead of turning them in to defendant; in addition, for each work period between October 24, 1938, and October 24, 1939, during which the tips and remunerations collected and retained by each Red Cap did not equal the number of hours worked multiplied by twenty-five cents (25 cents), the defendant paid to each of such Red Caps an amount equal to the difference; and for each work period after October 24, 1939, during which the tips and remunerations collected and retained did not equal the number of hours worked multiplied by thirty cents (30 cents) defendant paid to each Red Cap the difference; so that defendant has fully complied with its guarantee and has paid to and each Red Cap has received not less than the minimum provided by the Fair Labor Standards Act, notwithstanding such Act is inapplicable to them.

(c) With regard to the table of figures set out in Paragraph V of Plaintiff's Amended Complaint, defendant shows that it has not yet completed a full check of such figures, but that subject to possible minor differences revealed by such check and subject to its denial that the titles used as headings for the columns are appropriate or applicable, defendant admits that the named persons worked as Red Caps the number of hours set forth; that the amounts under the heading "Total Wages
21 Earned" are the correct result of multiplying the hours worked by twenty-five cents (25 cents) and thirty cents (30 cents) as shown; that the amounts shown in the next column were actually paid to the persons named by the defendant; and that the amounts in the last right hand column are the correct remainders when the amounts in the next to last column are deducted from the amounts in the preceding column. Any part of the next

to last column attributable to taxes paid, constitutes taxes imposed upon the individual Red Cap and required by law to be collected by the defendant.

VI.

As to Paragraph VI of Plaintiff's Amended Complaint, defendant shows that each of said Red Caps named received in excess of the amount shown opposite, in tips and remunerations, otherwise defendant denies the allegations of said paragraph.

VII.

Defendant denies all of the allegations of Paragraph VII of Plaintiff's Amended Complaint and all of the prayer of said complaint.

Wherefore, defendant prays that plaintiff take nothing by his suit and that defendant have judgment adjudicating that none of the persons named in plaintiff's Amended Complaint have any claim against defendant, and for all costs.

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
By ROBERT G. PAYNE,
GUS M. HODGES.

Answer served by mailing a copy thereof to Counsel for Plaintiff, May 16th, 1940.

22 SECOND AMENDED COMPLAINT.

Filed May 20, 1940.

(Title Omitted.)

I.

Jurisdiction of this cause is conferred upon this Court by Section 41 (8) of Title 28 of the United States Code for the reason that this suit is a civil action at law arising under a law of the United States regulating interstate commerce since it arises under the statute of the United States enacted June 25, 1938, entitled "The Fair Labor Standards Act of 1938" (Chapter 676, Section 1, 52 Stat. 1060).

II.

Plaintiff A. J. Pickett states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees, and is the duly authorized representative and attorney in fact of the hereinafter named persons designated herein as employees of the defendant, and that he has been duly authorized by each of the hereinafter named persons to bring this action in their behalf, as provided for in Section 16, Paragraph (b), of the Fair Labor Standards Act of 1938.

23 III.

Plaintiff further states that the defendant is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas, used and necessary in the transportation of persons and property in interstate commerce; that at its said terminal defendant

employes and at all times since October 24, 1938, has employed under an oral contract James Foster, Isaac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingsworth, J. T. Turpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Charles Langston, Charles Muckleroy, Felix Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, William McMurray, Sam H. Williams, Ernest Amos, Harry Barton, Adolphus Wells, Alphonso Connor, Lawrence McNeil, Cornelius Busby, Columbus Jackson, Everett Mathews, Frank Southern, Scott Campbell, H. N. Barton, Silas Kelton, Frank Bailey and Russell Elston, who are commonly known as red caps, to handle hand baggage and traveling effects of passengers and otherwise to assist their passage through said terminal; that substantially all the passengers asisted by said red caps were and are in transit to and among the several states of the United States; that during the work week beginning October 24, 1938, and continuing to the date hereof defendant at its said terminal in Dallas, Texas, has employed and is employing the aforesaid employees in interstate commerce, and that the services so performed by the aforesaid employees and defendant were during all of said time and now are an essential part of the transportation of passengers and property among the several states of the United States, and that said employees and defendant while performing such services were during all said time and now are engaged in such transportation, and in commerce among the several states of the United States.

24 IV.

Under the terms and provisions of the Fair Labor Standards Act of 1938, Section 6 (29 U. S. C. A. 206, 52

Stat. 1060), defendant was required to pay to each of the aforesaid employees wages at the rate of not less than Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23), 1939, and not less than Thirty Cents ($.30) an hour from and after October 24, 1939.

V.

Notwithstanding the requirements of said Fair Labor Standards Act of 1938, defendant has failed and refused to pay the aforesaid employees or any of them the sum of Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23, 1939, and the sum of Thirty Cents ($.30) an hour from and after October 24, 1939, to the date of the filing of this suit, but has paid said employees only a small part of said wages; that the following table shows in detail as to each of said employees the hours worked during the period from October 24, 1938, to October 23, 1939, the amount of wages earned at Twenty-Five Cents ($.25) per hour during said period, the hours worked during the period from October 24, 1939, to March 6, 1940, the amount of wages earned at Thirty Cents ($.30) per hour during said period, the total wages earned from October 24, 1938, to March 6, 1940, the total of the amount paid by defendant to each of said employees as wages for said latter period, and the amount paid on his behalf as taxes, and the balance due on the wages earned during said period from October 24, 1938, to March 6, 1940:

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Foster, James				
2,818½ hours @ $ .25	$704.56			
1,024 hours @ .30	307.20			
		$1,011.76	$49.06	$ 962.70
Johnson, Isaac				
2,783½ hours @ $ .25	0695.88			
1,040 hours @ .30	312.00			
		1,007.88	45.69	962.19
Franks, J. C.				
2,899-1/6 hours @ $ .25	$724.80			
1,084-11/12 hours @ .30	325.47			
		1,050.27	40.25	1,010.02
Brigham, J. W.				
2,880 hours @ $ .25	$720.00			
1,080 hours @ .30	324.00			
		1,044.00	33.83	1,010.17
Brooks, Lemuel				
2,832 hours @ $ .25	$708.00			
1,040 hours @ .30	312.00			
		1,020.00	49.63	970.37

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Johnson, A. R.				
2,835 hours @ $ .25	$708.75			
1,044 hours @ .30	313.20			
		1,021.95	47.78	974.17
Jefferson, John				
2,880 hours @ $ .25	$720.00			
1,080 hours @ .30	324.00			
		1,044.00	45.77	998.23
Alexander, O. A.				
2,912 hours @ $ .25	$728.00			
1,003-1/6 hours @ .30	300.95			
		1,028.95	52.00	976.95
Jackson, Joe				
2,912 hours @ $ .25	$728.00			
1,036-1/6 hours @ .30	310.85			
		1,038.85	52.52	986.33
McIntosh, Nathan				
2,912 hours @ $ .25	$728.00			
912 hours @ .30	273.60			
		1,001.60	49.51	952.00

Turner, Nelson				
2,896 hours @ $ .25	$724.00			
1,020 hours @ .30	306.00			
		1,030.00	55.52	974.48
Thomas, Allen				
2,784 hours @ $ .25	$696.00			
1,024 hours @ .30	307.20			
		1,003.20	44.28	958.92
Williams, Richard				
2,910 hours @ $ .25	$727.50			
1,072 hours @ .30	321.60			
		1,049.10	30.90	1,018.20
Hollingsworth, Ulyssus				
2,661½ hours @ $ .25	$665.38			
1,040 hours @ .30	312.00			
		977.38	59.41	917.97
Turpin, J. T.				
2,240 hours @ $ .25	$560.00			
1,040 hours @ .30	312.00			
		872.00	39.50	832.50

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Campbell, Dave				
2,556 hours @ $ .25	$639.00			
882 hours @ .30	264.60			
		903.60	40.18	863.42
Fields, Nelson				
2,556 hours @ $ .25	$639.00			
1,072 hours @ .30	321.60			
		960.60	49.89	910.71
Robertson, C. H.				
2,227½ hours @ $ .25	$556.88			
758 hours @ .30	327.40			
		784.28	46.15	738.13
Hunt, Haywood				
2,872 hours @ $ .25	$718.01			
1,080 hours @ .30	324.00			
		1,042.01	60.44	981.57
Spears, Donald				
2,873-2/3 hours @ $ .25	$718.42			
1,072 hours @ .30	321.60			
		1,040.02	45.08	994.94

Hynson, Clinton				
2,728 hours @ $ .25	$682.00			
1,060 hours @ .30	318.00			
		1,000.00	29.32	970.68
Curry, J. P.				
2,856 hours @ $ .25	$714.00			
1,064 hours @ .30	319.20			
		1,033.20	48.68	984.52
Langston, Charles				
2,696 hours @ $ .25	$674.00			
1,065 hours @ .30	319.50			
		993.50	83.78	909.72
Muckelroy, Charles				
2,880 hours @ $ .25	$720.00			
1,048 hours @ .30	314.40			
		1,034.40	124.28	910.12
Jackson, Felix				
2,904 hours @ $ .25	$726.00			
1,080 hours @ .30	324.00			
		1,050.00	58.63	991.37

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Brigham, Paul				
2,801½ hours @ $ .25	$700.38			
984 hours @ .30	205.20			
		995.58	34.61	960.97
May, Arthur				
2,865-2/3 hours @ $ .25	$716.42			
1,050 hours @ .30	315.00			
		1,031.42	70.42	961.00
Jones, Theodore				
1,936 hours @ $ .25	$ 484.00			
734 hours @ .30	220.20			
		704.20	26.50	677.70
Cameron, Tilson W.				
2,160 hours @ $ .25	$540.00			
923 hours @ .30	276.90			
		816.90	43.00	773.90
McMurray, William				
2,752 hours @ $ .25	$688.00			
1,062 hours @ .30	318.60			
		1,006.60	64.31	942.29

Williams, Sam H.				
472 hours @ $ .25	$118.00			
147-1/6 hours @ .30	44.15			
		162.15	10.21	151.94
Amos, Earnest				
2,860 hours @ $ .25	$715.00			
1,065 hours @ .30	319.50			
		1,034.50	236.56	797.94
Barton, Harry				
2,694½ hours @ $ .25	$673.63			
1,080 hours @ .30	324.00			
		997.63	41.75	955.88
Wells, Adolphus				
2,204 hours @ $ .25	$551.00			
1,056 hours @ .30	316.80			
		867.80	58.36	809.44
Connor, Alphonso				
2,676 hours @ $ .25	$669.00			
1,056 hours @ .30	316.80			
		985.80	50.03	935.77

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
McNeil, Lawrence				
2,828 hours @ $ .25	$707.00			
1,001 hours @ $ .25	300.30			
		1,007.30	114.80	892.50
Busby, Cornelius				
992 hours @ $ .25	$248.00			
1,059¾ hours @ .30	317.93			
		565.93	47.91	518.02
Jackson, Columbus				
2,872 hours @ $ .25	$718.00			
1,001 hours @ .30	300.30			
		1,042.00	53.61	988.39
Mathews, Everett				
2,680 hours @ $ .25	$670.00			
990¼ hours @ .30	297.08			
		967.08	40.35	926.73
Southern, Frank				
2,768 hours @ $ .25	$692.00			
1,003¾ hours @ .30	301.13			
		993.15	37.17	955.96

Campbell, Scott				
48 hours @ $ .25	$12.00			
		12.00	3.00	9.00
Barton, H. N.				
2,753½ hours @ $ .25	$688.38			
1,064 hours @ .30	319.20			
		1,007.58	42.03	965.55
Kelton, Silas				
584 hours @ $ .25	$146.01			
222-1/3 hours @ .30	66.70			
		212.71	16.36	196.35
Bailey, Frank				
1,351 hours @ $ .25	$337.75			
405-11/12 hours @ .30	121.77			
		459.52	20.72	438.80
Ellston, Russell				
2,896 hours @ $ .25	$724.00			
1,081½ hours @ .30	324.45			
		1,048.45	40.06	1,008.39
		$40,960.83	2,333.84	$38,626.99

VI.

That the amount respectively set opposite the name of each red cap in the column headed "Balance Due" in the above table, was received by each of said red caps as tips from passengers at and about defendant's terminal from October 24, 1938, to March 6, 1940.

VII.

That there is now due and owing to said employees from defendant the total sum of Thirty-eight Thousand Six Hundred Twenty-six Dollars and Ninety-nine Cents ($38,626.99), being the total minimum wages remaining unpaid for the period from October 24, 1938, to March 6, 1940.

Wherefore, plaintiff prays that judgment be entered herein against defendant in favor of plaintiff for the sum of Thirty-eight Thousand Six Hundred Twenty-six Dollars and Ninety-nine Cents ($38,626.99), being the amount of the unpaid minimum wages due said employees, as aforesaid, and for an additional equal amount as liquidated damages, and that the Court further allow a reasonable attorney's fee to be paid by defendant, and the costs of this action.

W. T. SAVAGE,
(W. T. Savage)
CHARLES M. HAY,
(Charles M. Hay)
S. D. FLANAGAN,
(S. D. Flanagan)
EDWIN D. FRANEY.
(Edwin D. Franey)

Copy delivered to Deft.'s Atty., May 20, 1940.
W. T. SAVAGE,
Atty. for Plff.

31 JUDGMENT.

Filed May 28, 1940.

(Title Omitted.)

This cause came on to be heard on the 27th day of May, A. D. 1940, before the Court sitting without a jury, and the Court having heard the evidence adduced, and the argument of counsel, and being unable to conclude the hearing on said day, the cause was laid over to the 28th day of May, 1940, and said hearing being now concluded, it is Ordered, Adjudged and Decreed that Plaintiff, A. J. Pickett, have and recover of defendant The Union Terminal Company, for and on behalf of each of the following named individuals, the sums opposite their names found by the Court to be unpaid minimum wages and liquidated damages, respectively, and that plaintiff have and recover of defendant an attorney's fee of $500.00, making a total sum of $77,753.98, together with the costs of this proceeding, which plaintiff shall have and
32 recover of defendant, and that execution issue therefor.

	Unpaid Minimum Wages	Liquidated Damages	Total Unpaid Minimum Wages and Liquidated Damages
Foster, James	$962.70	$962.70	$1,925.40
Johnson, Isaac	962.19	962.19	1,924.38
Franks, J. C.	1,010.02	1,010.02	2,020.04
Brigham, J. W.	1,010.17	1,010.17	2,020.34
Brooks, Lemuel	970.37	970.37	1,940.74
Johnson, A. R.	974.17	974.17	1,948.34
Jefferson, John	998.23	998.23	1,996.46
Alexander, O. A.	976.95	976.95	1,953.90
Jackson, Joe	986.33	986.33	1,972.66
McIntosh, Nathan	952.09	952.09	1,904.18
Turner, Nelson	974.48	974.48	1,948.96

	Unpaid Minimum Wages	Liquidated Damages	Total Unpaid Minimum Wages and Liquidated Damages
Thomas, Allen	958.92	958.92	1,917.84
Williams, Richard	1,018.20	1,018.20	2,036.40
Hollingsworth, Ulyssus	917.97	917.97	1,835.94
Turpin, J. T.	832.50	832.50	1,665.00
Campbell, Dave	863.42	863.42	1,726.84
Fields, Nelson	910.71	910.71	1,821.42
Robertson, C. H.	738.13	738.13	1,476.26
Hunt, Haywood	981.57	981.57	1,963.14
Spears, Donale	994.94	994.94	1,989.88
Hynson, Clinton	970.68	970.68	1,941.36
Curry, J. P.	984.52	984.52	1,969.04
Langston, Charles	909.12	991.12	1,819.44
Muckelroy, Charles	910.12	910.12	1,820.24
Jackson, Felix	991.37	991.37	1,982.74
Brigham, Paul	960.97	960.97	1,921.94
May, Arthur	961.00	961.00	1,922.00
Jones, Theodore	677.70	677.70	1,355.40
Cameron, Tilson W.	773.90	773.90	1,547.80
McMurray, William	942.29	942.29	1,884.58
Williams, Sam H.	151.94	151.94	303.88
Amos, Earnest	797.94	797.94	1,595.88
Barton, Harry	955.88	955.88	1,911.76
Wells, Adolphus	809.44	809.44	1,618.88
Connor, Alphonso	935.77	935.77	1,871.54
McNiel, Lawrence	892.50	892.50	1,785.00
Busby, Cornelius	518.02	518.02	1,036.04
Jackson, Columbus	988.39	988.39	1,976.78
Mathews, Everett	926.73	926.73	1,853.46
Southern, Frank	955.96	955.96	1,911.92
Campbell, Scott	9.00	9.00	18.00
Barton, H. N.	965.55	965.55	1,931.10
Kelton, Silas	196.35	196.35	392.70

	Unpaid Minimum Wages	Liquidated Damages	Total Unpaid Minimum Wages and Liquidated Damages
Bailey, Frank	438.80	438.80	877.60
Ellston, Russell	1,008.39	1,008.39	2,016.78
	$38,626.99	$38,626.99	$77,253.98

To the foregoing judgment the defendant in open Court objected and excepted.

Dated May 28th, 1940.

WM. H. ATWELL,
U. S. Dist. Judge.

O. K. as to form.
ROBERTSON, LEACHMAN, PAYNE, GARDERE & LANCASTER,
ROBERT G. PAYNE,
GUS M. HODGES,
Attorneys for Defendant.

Approved as to form.
S. D. FLANAGAN,
ED. FRANEY,
CHAS. M. HAY,
W. T. SAVAGE,
Attorneys for Plaintiff.

DEFENDANT'S MOTION FOR A NEW TRIAL.

34 Filed June 7, 1940.

(Title Omitted.)

To the Honorable Court:

Now comes The Union Terminal Company and moves the Court to set aside the judgment rendered herein and grant a new trial, on the following grounds:

I.

The Court erred in holding that this defendant's employer's notice of October 22, 1938, given to each of its Red Cap employees setting out the terms and conditions of their future employment did not bind the latter in law by their conduct in continuing in service, collecting, reporting and retaining tips, and accepting payment of the difference between the income received from tips and the minimum wage requirements from the defendant, because such clearly was a notice specifying conditions of future employment which in law was binding upon those em-
ployees thereafter continuing in service and ac-
35 cepting wages paid and based thereon, and said
Red Caps rejected their only alternative of exercising their right to quit work if dissatisfied with the terms of future employment prescribed by the employer in said notice.

II.

The Court erred in holding that the letter of protest written to defendant employer on October 24, 1938, by A. J. Pickett had the effect of depriving defendant of its right, exercised in its October 22nd notice, of prescribing

the terms of future employment for its employees; because the Red Caps, by continuing in the service, accepted the conditions of such notice, and such conduct had the legal effect of contradicting anything said or implied in said protest letter; and further because, in any event, said protest letter does not purport to be or does not amount to a refusal to be bound by the terms imposed upon them in their future employment, but is merely a statement of a legal opinion that the legal effect of the method prescribed is not in compliance with the Fair Labor Standards Law.

III.

The Court erred in failing to hold that, regardless of whether or not there was an agreement to the terms of the October 22nd notice, the defendant complied with the Fair Labor Standards Law; because if, as held by the Court, the Red Caps are defendant's employees it must follow that the service rendered the patrons is furnished by the employer defendant; that, unlike gratuities given over and above the price of the service, the tips were given in payment of the service rendered by defendant through the Red Caps, hence such payments for such service belonged in law to defendant, the one furnishing the service, and it had the right and power to
36 control and dispose of such income belonging to it, which right and power it exercised by applying same on wages. It was unnecessary for it to follow the formality or mechanics of having such payments manually delivered to defendant and then manually delivering it back to the Red Caps as wages, as the method prescribed and followed had that legal effect.

IV.

The Court erred in rendering judgment for the plaintiff herein for wages in the sum of $38,626.99 because the

plaintiff wholly failed to discharge the burden placed on him by law of alleging and proving that the $38,626.99, admittedly received by the Red Caps during the period, was paid to the Red Caps as a gratuity and was an amount over and above the amount paid by such patrons to and received by the company as compensation for the service rendered by the company to the patron through the Red Caps.

V.

The Court erred in holding that each of the Red Caps for whom this action is brought, was "engaged in commerce"; because the service performed by said Red Caps is purely local, forming no part of any interstate commerce and on the contrary is independently arranged for, directed and compensated for, not included in the price of ticket or arranged with and as a part of the interstate journey.

VI.

That under the pleadings and evidence, even though it be found that there was no contract making the retention of tips a payment of wages and that in the absence of such contract the tips collected and retained by the Red Caps were not wages paid them, still it appears as a matter of law that said Red Caps,
37 while acting in the course of their employment for defendant collected payments made by the defendant's patrons in the form of tips for services rendered to the patrons by the defendant through the Red Caps, which payments as a matter of law belong to defendant and which exactly offset any claim for wages by plaintiff, so that a new trial should therefore be granted. In the alternative, if the Court holds that such

offset should be formally set up by way of counterclaim. defendant asks the Court to grant a new trial herein and allow a trial on the issues raised by defendant's counterclaim in accordance with defendant's application for leave to file and be heard on such counterclaim.

Wherefore, Defendant prays, that the judgment herein be set aside and a new trial granted; and in the alternative defendant prays that it be allowed to file a counterclaim herein and have a trial on such counterclaim so that it may be disposed of in the final judgment herein.

JOHN C. ROBERTSON,
GUS M. HODGES,
ROBERT G. PAYNE,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

This motion served on plaintiffs by mailing a copy of same to plaintiff's counsel.

June 7, 1940.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL.

37½ In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, et al,
vs. No. 248 Civil Action.
The Union Terminal Company.

ROBERTSON, LEACHMAN, PAYNE, GARDERE & LANCASTER,
Attorneys for Defendant.

505 Republic Bank Bldg.,
Dallas, Texas.

38 In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, et al,
vs. No. 248 Civil Action.
The Union Terminal Company.

Brief in Support of Defendant's Motion for New Trial.

Preliminary Statement.

For thirteen years, the company furnished to the traveling public a service, in the form of assistance with baggage, by agreeing with the red caps that in consideration of their labor used in furnishing this service, each red cap could and would retain the entire income collected by him and paid by the public in return for the

service. Under this arrangement the company did not directly pay wages as such to the red caps but neither did it directly receive any income for the service it rendered through them. The service from an expense standpoint therefore was self sustaining, and each red cap's income was dependent upon the amount of work he did and his alertness to duty. He was automatically paid on a piece work basis. His total collections constituted his total wages for work performed. They were on its premises under this arrangement at the sufferance of the company.

In 1938 shortly prior to the effective date of the Wage & Hour Act, the Interstate Commerce Commission classified red caps as employees of the Terminals where they worked. The company by agreement still permitted the red caps to retain all of the income so collected, as it still had no wage expense in connection with them. During all of this time, as a matter of custom and common knowledge of the traveling public, compensation for such service was expected by the red cap and universally paid by the public. This agreement between the Union Terminal Company and the red caps, that the latter could work on its premises rendering this service to the patrons and retaining the tips in payment of the red cap labor, continued in force until October 22, 1938.

The effective date of the Wage & Hour Act was close at hand and while this company was of the opinion that these red cap employees were not engaged in interstate commerce, and they did not come within the provisions of the Act, nevertheless, there being no authoritative ruling or adjudication on the point, precaution demanded that it proceed in such a manner that, if it be wrong, it would not have

in the meantime violated the terms of such Act. Thus for the first time in many years the company, proceeding upon that basis, was about to incur a fixed expense for wages to these red caps in a large sum of money each year as is evidenced by the amount sued for herein. It was then the normal and businesslike thing for the management to consider and determine that, facing this new annual expenditure of many thousands of dollars for wages, it, as all other business facing a new expense must do, must provide for the necessary income with which to pay such new expense in the form of wages. The natural source of such income, which necessarily had to be secured, was from the persons who would receive the benefit of the services for which the wages were to be paid, namely, the patrons. Accordingly, the company notified each of said red cap employees, in the light of the Fair Labor Standards Act, that "in consideration of your *hereafter engaging in* the handling of hand baggage, etc., * * * it would be necessary that you report daily * * * the amount received by you as tips or remuneration *for such services* * * *. You are *privileged* to retain, *subject* to their being credited on such guarantee all such tips or remuneration * * *. All the matters above referred to are subject to the right of the carrier to determine from time to time * * * *the accounting* required." In the same letter the carrier guaranteed to each red cap "compensation, which *together with and including* the sums of money received as above provided, not less than the minimum wage provided by law".

41

Since the parties were not in disagreement concerning the exact workings of their prior arrangement, the sending of this notice to each of said employees very definitely terminated the prior agreement with reference to tips and working arrangements; and it notified

the red cap employees that the company would not agree any longer that the income derived from such service, the tips paid by the public for such service, could be unconditionally retained as the property of the red caps as had been the case in the past. It evidenced a very definite order and direction from the employer to the employee concerning the ownership and disposition of the income to be received by the employee while working in the course of his employment for the employer and received by him for doing exactly that work for which the company expected to begin paying wages which it had not theretofore paid. The notice clearly showed that the company claimed the ownership of this income derived from the service which it thereafter was going to render to the public at its own cost and expense and which it had not theretofore rendered to the public at its own cost and expense. Since it was the employer and the red caps were its employees and it was going to pay them wages to perform the work, it had a right to direct them in the manner and details of the
42 work and to require them to account for the proceeds derived from the work. There can be no question about the fact that the company clearly made the above a part of the future contract of employment of the red caps as is evidenced by the language "in consideration of *your hereafter engaging in* the *handling* of hand baggage", etc.

The employees, through their representative, under date of October 24, wrote to the company a letter designated by them as a "protest", by the terms of which the employees advised the company that in reply to the company's notice with reference to "crediting tips and other moneys paid * * * by persons other than itself", that said employees from "examination of the law in its entirety", were of the opinion that the law "does not

authorize a carrier to depend upon others to discharge its obligation * * * in payment of wages imposed thereby", and that "each employee concerned" as a protest against the *method proposed* * * * (because) * * * the carrier has acted * * * without authority in law * * *.

The red caps' letter of October 24th eliminating therefrom the statement which quoted the law and which gave their opinion as to the legal effect of the law as applied to the facts, is boiled down to the proposition that the red caps *"protested"* against the *"method"* proposed, apparently with the view that the company *would not be entitled under the law to use the income* to be derived from the services which the company would
43 thereafter render to the public at its own cost and expense. They both did agree that the red caps were employees of the company and that if the red caps did thereafter "engage in the handling of hand baggage", etc., as such employees, then, in consideration of the performance of such labor, the company would pay and the red caps would receive wages not less than the minimum requirements set out in the Fair Labor Standards Act.

The Red Caps under the undisputed facts viewed in light of the unquestioned law, in effect said:

(1) That you are the employer and, if we continue working for you in the future, we are your employees.

(2) That our contract of employment is terminable at the will of either party; and for such reason you may discharge all of us now; that you are not obligated to continue us in your employ and we are not obligated to continue in such employment.

(3) That a new employment contract, express or implied, is necessary for you have clearly advised us that our old contract is at an end.

(4) That is the employer, if we continue in your employ, you do have the legal right to set and prescribe for the future our hours of work and rate of pay so long as our wages are not less than 25¢ an hour; and you also have the legal right to control and supervise us in the means, method and manner in which we shall do our work.

44 (5) That, if we work for you in the future and you pay us to do this work for you, our efforts belong to you and the work we do or service we perform *is done and performed by you.*

(6) That when you perform a service through your employees you are entitled in law, equity and fair dealing to the income to be derived from such service performed by you and at your expense.

(7) That being the employer, you may devise and use any system of accounting with reference to income and payment of wages as to you may deem advisable and proper so long as you do not violate the spirit and intent of the Fair Labor Standards Act, which requires that we shall receive as wages for our work for you a sum not less than 25¢ an hour.

However, it is contended in this suit by the representative of the Red Caps that the notice of October 22, 1938, was not binding; and that in the absence of an acceptance of the conditions of such notice, the tips received by the Red Caps since October 24, 1938, are the property of the Red Caps, and could not be used by The Terminal Company in the discharge or payment of wages.

We have briefed herein our answer to these two propositions, asserting first (under Assignments of Error I and II of Defendant's Motion for New Trial) that the notice of October 22, 1938, was binding upon them and formed the basis upon which the Red Caps
45 worked from October 24, 1938, to March 6, 1940; and second (under Assignment of Error III) that *regardless* of the question of acceptance, the tips collected by the Red Caps after October 24, 1938, were the property of and were owned and controlled by The Terminal Company, which company had the lawful right to apply such tips against wages or dispose of such tips in any manner it saw fit.

Other grounds are set up in Defendant's Motion for a New Trial and are not intended to be waived hereby; but this informal brief is confined to the two Propositions mentioned.

I.

The notice of October 22, 1938, from the Union Terminal Company to the Red Caps, followed by the action of the Red Caps in continuing in the employment of the Union Terminal, fixed the status of tips as wages, despite the so-called protest of October 24, 1938.

The notice of October 22, 1938, provided that "in consideration of your *hereinafter engaging* in the handling of hand baggage, etc. . . . it will be necessary that you report daily . . . the amount received by you as tips or remuneration for such services. . . . You are *privileged* to retain, *subject to their being credited on such guarantee* . . ." At the same time The Union Terminal Company guaranteed to each Red Cap "compensation,

which together with and including the sums of
46 money received as above provided will not be less than the minimum wage provided by law".

If any prior agreement existed between The Terminal Company and the Red Caps with reference to the ownership of tips, this notice definitely terminated it, as the Red Caps were advised that in the event they thereafter continued in the employ of The Terminal Company, through which employ they were placed in position to collect tips, The Terminal Company would not agree any longer that such tips could be unconditionally retained as the property of the Red Caps. The whole notice clearly contemplated that "in consideration of (the Red Caps) thereafter engaging in the handling of hand baggage", The Terminal Company would guarantee a stipulated wage, but that ownership and control of tips should be in The Terminal Company to be applied in the payment of such wage. The situation of the Red Caps was no different than would have been that of any person newly seeking employment or theretofore not employed by The Terminal Company. They were presented with a unilateral offer of employment outlining definitely the conditions thereof. The notice clearly said to the Red Caps that if you hereafter engage in the handling of hand baggage, you will do so under the following conditions, to-w.t: etc. When the Red Caps thereafter engaged in the handling of the baggage, their action in so doing automatically accepted the only conditions of employment held out to them.

47 Certainly The Union Terminal Company had the legal right on October 22nd to offer employment for services *thereafter to be perfotmed*, on whatever conditions it saw fit, so long as its offer did not constitute a violation of the law. The notice of October

22nd stipulated in effect that thereafter tips should be owned and controlled by The Union Terminal Company. There is no provision in the Fair Labor Standards Act forbidding an employer from offering employment under the condition that tips received in the course of the employee's work should be owned and controlled by the employer. Such a provision would have been unconstitutional. See Ex Parte Farb, 174 Pac. 320, wherein it is said:

"Even if we concede that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditures of one's earnings.

The statute under review is void because it is in conflict with the due process provision of the Constitution of the United States, etc." (U. S. Supreme Court authorities cited.)

The failure of the Act to include tips in the definition of wages does not purport to be and cannot be construed as an implied prohibition of the right of an employer and employee to contract covering the ownership of tips, or as a prohibition of the right of an employer to offer employment conditioned upon the ownership and control by him of tips received in the course of employment.

48 Any such attempted prohibition would itself have been unconstitutional. The Red Caps are employees of The Terminal Company. The service that is rendered *by The Union Terminal Company* through its Red Cap employees is paid for by tips. So long as The Union Terminal Company complies with all laws, nothing prohibits it from offering employment conditioned on the exercise by it of ownership and control over the payment made by the public in the form of tips for the service rendered the public by *The Union Terminal Com-*

pany through its employees; nothing prohibits it from going to the extreme of forbidding the acceptance of any tips at all, just as is done in some restaurants. There was therefore nothing in the Fair Labor Standards Act *prohibiting* The Union Terminal Company from offering to certain individuals employment under the terms of the instrument of October 22, 1938.

But, it is argued, the notice of October 22nd was an offer which was rejected by the so-called letter of protest written on October 24, 1939, by the Chairman of a Brotherhood claiming to represent the individuals to whom an offer of employment had been made. If it is to be claimed that such letter of protest clashes with and overcomes the action of the Red Caps in actually *thereafter* "engaging in the handling of hand baggage" in the employ of The Terminal Company and in carrying out all of the conditions of the offer of October 22nd including the receipt of pay (the possible correctness of such claim, considered from any angle, of course being denied by defendant) certainly the terms of the letter of October 24th should be analyzed carefully.

49 The first paragraph of the letter reads:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22nd, 1939, and which was handed to each employee to whom it was addressed: i. e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

There is nothing in this first paragraph which suggests a rejection of the terms of employment offered the Red

Caps by The Terminal Company; it is simply an undertaking to summarize the contents of the notice of October 22nd.

Then the second paragraph of Mr. Pickett's letter of October 24th reads:

"In other words the carrier contemplates crediting tips and other monies paid its employees by persons other than itself to relieve itself of the obligation imposed by the following quoted section of the law:

"Fair Labor Standards Act;

"Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour."

50 This is simply a further attempted summary of the notice of October 22nd, accompanied by a quotation from the Fair Labor Standards Act. It says nothing about any employee rejecting the offer of employment.

The next two paragraphs of Mr. Pickett's letter read:

"The above section of the law which is quoted in part for the purposes of this notice, clearly sets forth that every employer who engages in commerce shall pay to each of his employees during the first year after the effective date of the law, 25¢ per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby."

These two paragraphs contain merely an undertaking to construe the Act, a statement of a conclusion as to what the Act means, not a rejection of an offer of employment.

The letter then concludes:

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein."

51 Here is the "protest" against *the method* proposed by the carrier to comply with the law and an expression of opinion that the law will not be complied with if The Terminal Company's proposal is put into effect. It contains nothing even implying that the employees reject the notice and nothing in conflict with the subsequent *action* of the employees in working for a year and a half under and in accordance with the notice, but simply is an expression of view that the terms set out in the notice do not comply with all the requirements of the Fair Labor Standards Act.

The letter does not say "we refuse to proceed under the notice", but at most says in effect: "Even though we do proceed under the notice, we do not construe it as a

complete compliance with the Act and we do not waive our rights under the law". (This is the reservation or contention referred to in subsequent correspondence and in Rule 16 of the Working Agreement of January 1, 1940, the latter simply providing that in the event of discharge and reinstatement of an employee, he would be reimbursed for any money losses should it be legally determined that he was entitled thereto "under the provisions of the 'Fair Labor Standards Act'.". In adopting Rule 16, it is clear that neither The Terminal Company nor the Red Caps conceded that the legal position of the other was correct. Certainly The Terminal Company continued to operate under the terms of the October 22nd proposal, considering that such proposal was in full compliance with the law; and the Red Caps did not deny that they were working and receiving pay under the proposal of October 22nd, but at the same time they
52 did not waive their contention that the proposal was not in full compliance with the law.)

The men proceeded thereafter to work under the only conditions of employment offered them. Can their *action* be *ignored*, and can it be said that they were working under no contract at all; or is it not more reasonable to say, giving full force to every word in the letter of October 24, that the men in "*therafter engaging in the handling of hand baggage*" accepted the notice and the work offered thereunder but took the position that it would not fulfill defendant's obligation under the law and that they reserved by protest any rights given them under the law?

Of course the men are entitled to the full protection of the law; and if the terms of the notice, as contended by Mr. Pickett in his letter of October 24, were not in compliance with the law, it does not deprive the Red

Caps of any rights, under the law. But is it not clear that the letter of October 24 did nothing more than express a view as to whether or not the proposal of October 22 was in complete compliance with the law and reserve to the men the full protection of the law? Certainly the letter does not purport to reject *any lawful* part of the proposal. So if the letter of October 24 is to be given any weight at all in the face of the overt *action* of the men in "thereafter engaging in the handling of hand baggage", is it not effective at most *only* in so far as it is accurate or correct in the view that the notice
53 of October 22nd does not fulfill the obligations imposed by the terms and provisions of the Fair Labor Standards Act?

In the last analysis therefore, giving full force to the letter of October 24, are we not back to the proposition: Is there anything unlawful about a notice by an employer to an employee that tips collected by such employee in the course of his employment shall belong to and be controlled by the employer? This question has already been answered herein.

But if Mr. Pickett's letter of October 24th can be construed, not as an undertaking to express a view as to the legal effect of the notice of October 22nd plus a reservation of the full protection afforded by the law, but as an outright rejection of employment as offered by said notice and a refusal to work thereunder, we would still insist that the action of the men in actually "thereafter engaging in the handling of hand baggage" was of more controlling effect than any "protest" of October 24th, and operated as an acceptance of the unilateral offer of October 22nd, 1938, the only offer of employment ever made by the Terminal Company.

We have already called the Court's attention to the case of *Shuppan vs. Peoria Railway Terminal Co.*, 30 F. (2d) 569, which appears to be exactly in point. Briefly, in the latter case, the Terminal Company found it necessary to take a definite stand with its employees relative to the matter of wages. First, the employees
54 were told that they could take their choice between one of two courses: accept a certain wage, or in the alternative take the income of the company after deduction of the cost of operating the company. Within a few days after these conditions were laid down, the employees held a meeting and decided they *would not accept* either proposal, and they so advised the management of the Terminal Company. Shortly thereafter the general manager of the Terminal Company posted a bulletin outlining the manner in which wages would be handled. The Employees' Committee then wrote the manager again protesting and stating definitely that they *would not accept* the terms of employment as set forth in the Terminal Company's bulletin. Nevertheless thereafter the employees, as did the Red Caps in our case, continued to work, and, as stated on page 569 of the opinion by the Seventh Circuit Court: "The company then began to pay the employees as announced in the bulletin". After letting a year or so go by (as they did in this case) the employees brought suit for the difference between the wages received by them and the wages they claimed they were entitled to under their previous employment and some ruling of the United States Labor Board. The Court held that despite their written notification that they would not accept the terms of employment offered, the employees *by remaining in the employ of the company*, accepted the company's proposal and estopped themselves from thereafter taking another position. The Court used this language on page 570:

"Offered the alternative of accepting a wage cut or leaving the service, the men reported apparently to the effect that the wage cut was not acceptable. Still no one left the service. By remaining in the employ of the company they manifested more positively that the proposal that they leave the service was not acceptable."

(It might be stated here that in the Shuppan case nothing was actually said in the employer's bulletin about leaving the service if the terms of the offer of employmen were not acceptable.)

"Only the company could fix the wages of those who were willing to work for it. Only the employees themselves could say for whom they would work. If either proposed terms of employment unacceptable to the other, nothing prevented the dissatisfied party from terminating the relationship. The company having made it clear what wages it would pay its employees, those who took employment with it thereafter *or those who continued in its employment*, though mistaken as to the power of the company to fix wages, *must be deemed thereby to have accepted the only terms upon which such continued employment was offered.*" (Italics ours.)

The plaintiff in this case, by taking the position that his cause of action was preserved by the "protest" of October 24, 1938, says in effect that the Red Caps continued to work thinking that under the law the Terminal Company had no right to exercise ownership or control over the disposition of tips. But under the law the exercise of such right was not and could not have been prohibited; and the Terminal Company on October 22, 1938, advised each Red Cap in clear language that he could thereafter work on its premises and engage in the handling of hand baggage and col-

lect tips for such service *on the condition* that such tips be accounted for and be applied upon a wage which the employer guaranteed to pay him. While the employees under date of October 24 may have expressed the view that the Terminal Company was not complying with the law, and might even, for argument's sake, be said to have refused on October 24 to work under the conditions laid down, nevertheless on October 25 and ever since *they have worked;* and, if the decision of the Circuit Court of Appeals in the Shuppan case is the law (and we know of no authority contrary thereto) "the (Terminal) Company, having made it clear what wages it would pay its employees" (or having made it clear to whom the ownership and control of tips would belong) "those who took employment with it thereafter, or those who continued in its employment, *though mistaken as to the power of the Company* to fix wages, must be deemed thereby to have accepted the *only terms upon which such continued employment was offered*".

Moreover in addition to the Shuppan case, there is a recent definite statement of the law in Texas on the question. We submit that on the issue as to whether or not there was a contract consummated in this case, the Texas law controls though the cause in other respects involves a federal statute, particularly so when the only reported federal authority is in agreement with the Texas law. (This case was not called to the Court's attention in the argument at the close of the evidence.)

57 The case, setting out the Texas law by the Fort Worth Court of Civil Appeals, no writ of error noted, is *L. G. Balfour Co. vs. Brown*, 110 S. W. (2d) 104. In that case an employee by cross action sought to recover commissions as compensation for his services based on his original contract of employment. The em-

ployer defended on the ground that the original contract had been changed as to commissions to be paid for the employee's services by its notice of such change given to the employee, notwithstanding a protest of such change by the employee. The Court's opinion clearly sets out the position of the parties and its holding so we quote rather than discuss:

"The determination of this proposition is largely the *controlling issue* in the controversy. The substance of the proposition is that the parties operated under a written contract until August 22, 1930, which provided that appellee (employee) should receive for his services commission on his own sales, and in addition thereto a special bonus of 10 per cent on the net prices and also a bonus of 10 per cent of the net prices on salesmen working under his supervision, and that the contract also provided that such conditions existed so long as the employee's services were satisfactory to the company; but that on August 22, 1934, the appellant (employer) *advised* appellee, in writing, the bonus *thereafter*, under said contract, *would be* reduced to 5 per cent on subsalesmen's sales and 2 per cent on appellee's own sales; in the same letter agreeing to wipe out a deficit for which appellee was responsible; that appellee *protested the change* made by appellant in the contract,
58 but, *having reached no mutual agreement* about the matter, the appellee continued to work for appellant until in June, 1935, when he resigned, receiving compensation as provided in appellant's letter of August 22, 1934; therefore *he was not entitled* to claim, when sued, settlement under the written provisions of the contract, but is *bound by the change* made by appellant in its letter of date August 22, 1934.

"A stipulation in the contract reads: This contract may be determined at any time at the option of the com-

pany upon a breach of any of the conditions of this contract and may be terminated at any time during said term by either party, for any other reason, upon thirty days notice in writing of the intention to do so first being given to the other party, or by mutual consent in writing of the parties hereto. * * *'

"The contract, the agreement of ratification, and the addenda to each perhaps conveyed to the interested parties the nature of appellee's employment, his duties and compensation to be received until in August, 1934, *when the appellant claims to have effectively terminated the original contract and made a different one* with appellee as respecting compensation.

"Upon the soundness of this contention depends whether or not the Trial Court rendered a proper judgment in the case. We believe the Court reached an improper legal conclusion when he found at paragraph 7: 'Inasmuch as the preponderance of the credible testimony showed that A. H. Brown did not agree to a modification of any of the contracts existing between himself and plaintiff, I conclude said contracts were not modified in any respect.'

59 "The original contract could be terminated by either party in the manner therein set out; and, while appellant did not, in so many words, declare its intention to terminate the contract and give the thirty days' written notice to appellee, yet its letter of August 22, 1934, *had that effect*; at least it was a declaration amounting to a breach of the terms of the contract in the matter of compensation to appellee.

"When appellant made this change in appellee's compensation at variance with the contract, he was called up

to elect whether he would accept the modified contract or rely upon the old and sue for its breach. He could not continue his services under the new or modified contract *and later rely* upon the terms of the old; his election must have been made within a reasonable time after the condition arose. Appellee continued in appellant's services with full knowledge of the new schedule of commissions and bonuses provided for in the letter of August 22, 1934; *but of course this continued service was not without protest; however, an earnest protest was not sufficient, he was called upon to act; this he did by continuing in the service.*

* * * * *

"The Court found as a fact that appellee did not at any time consent to any modification of the compensation due him under the terms of the original contracts, and that the terms of said contracts in all respects continued in full force and effect until appellee resigned in June, 1935. It was upon this finding of facts that the (trial) Court based his conclusion of law that the contracts remained in effect entitling appellee to the compensation provided in the original contracts. *In this we think the Court erred.*

60 "Appellee testified that, after receipt by him of the letter of August 22, 1934, from appellant, his net commissions were figured on the basis of that letter; that he continued to work for appellant thereafter until in June, 1935, when he resigned. We think this shows an election on the part of appellee to ratify, though reluctantly, the modified or changed contract as embraced in appellant's letter.

* * * *

"The judgment rendered in this case was based upon the theory that appellee, not having agreed to a modification of the contract, was entitled to recover commissions and bonuses based on the provisions of the original contracts, and for the reasons stated and under the authorities cited we think the Court erred in these conclusions of law applicable under the facts."

Just so in the present case, when defendant served the notice of October 22nd on the Red Caps they were called upon to elect whether they would accept the change or treat the relationship as ended. "An earnest protest was not sufficient, he (they) was called upon to act, this he (they) did by continuing in service." We believe the above decision to be squarely in point with out facts here, and it being the Texas law should control the decision here on the question as to whether or not the Red Caps, in law, may now disregard and not be bound by the terms of employment set out in such notice of October 22nd.

61 Suppose that, in place of the letter of October 24, which merely undertook to place an interpretation on the Fair Labor Standards Act and to reserve to the Red Caps all the rights which the law gave them, the Red Caps had gone much further and had each in person on October 24 stated to the Terminal Company that they would not accept the employment offered. The Terminal Company on its part made no change in the terms of its offer of employment, and suppose that without any further communication, the Red Caps or some of them turned up on October 25 and "engaged in the handling of hand baggage" and continued so to engage thereafter. Could they sue the Terminal Company thereafter on quantum merit or some other theory, or would it not be held, as in the Shuppan and Balfour cases, that their

action was contrary to their expressed intention, such action was controlling and they "must be deemed thereby to have accepted the only terms upon which such continued employment was offered?"

What exempts the Red Caps from the ancient rule that one cannot accept the benefits of a contract and at the same time reject its burdens? Interpreting the letter of October 24 in its most favorable light to the plaintiff, do we not have this situation: The Terminal Company made only one offer of employment, that of October 22, 1938. That offer contemplated that acceptance thereof would be by action, namely "hereafter engaging in the handling of hand baggage". The Red Caps thereafter so engaged, but, under plaintiff's theory, they said in effect: "All right, we will and do accept
62 the privilege of working on your premises and the advantages accruing thereto; we will and do accept your guarantee of $60 or $70 a month and your checks issued thereunder; but we decline to accept some of the other conditions of your offer." In other words, we will take the work and take your money and all other advantages held out to us, but we reject anything that we may consider a burden. But the offer of October 22nd was a *whole* offer, not a *divisible* one. The most the Red Caps could have done *(and the only thing they did or tried to do in the letter of October 24)* was to refuse to be bound by any *unlawful* condition in the offer and to reserve to themselves the full protection of the law. Of course, they are entitled to that protection anyway. So again we get back to the proposition that inasmuch as there was nothing unlawful about the notice of October 22, 1938, no violation of the Fair Labor Standards Act, only the lawful exercise by the Terminal Company of its right to own and control the tips received in connection with the performance of a service by it through its em-

ployees, accompanied by a guarantee of the payment of the full wage provided for in the Fair Labor Standards Act, such notice was accepted by and is binding upon the Red Caps involved herein.

II.

Even in the absence of an agreement therein between the employer and employees the income received from the patrons in payment of the service rendered such patrons belonged to the company as a matter of law.

63 The law always views any situation from a standpoint of substance rather than form. Here the employees were not and could not rightfully be in disagreement on matters of substance, namely, those matters enumerated in the numbered paragraphs on pages 6-7 supra, but disagreed only on a matter of form that is the "method" of payment of wages. The reason given by them that the form, i. e., the method of payment was wrong was that "the law does not authorize the carrier (the employer) to depend upon others (the passengers) to discharge its obligation * * * in the payment of wages (to its employees) imposed thereby". *It is an unerring law, that can "withstand the erosion of time", that no business may survive unless its income exceeds or at least equals its expense; that its income must be derived from its patrons in exchange for the commodity it sells to or the service it performs for such patrons. *Every business* that survives, disregarding the mechanics or methods used, *depends upon others* to discharge its obligation in the payment of wages to its employees". To say that an employer cannot use income paid by its

*Words in brackets inserted by us for emphasis and clarity of application.

patrons, in return for services performed by the employer for such patrons, in the discharge of its wages is to say that it must pay same out of its capital assets, if any it has, until they are exhausted and then it can no longer continue in business and therefore can no longer pay wages. This doctrine if followed would create unemployment in catastrophic proportions. To seriously

64 consider even for a moment this principle, advanced by said employees as the basis for their protest, compels the inevitable conclusion that all employers, even this one, had the right to depend upon their patrons for income with which to discharge their obligations in the form of wages to their employees; and that the "protest" was illogical, unsound and ineffective.

Assuming, however, for the sake of argument that as a result of the protest there was no agreement, did this income, *in the absence of an agreement thereon*, between the employer and the employee, belong *as a matter of law* to the employer or the employee?

There is nothing in the Fair Labor Standards Act or any other law which prohibits an employer from having the ownership of and exercising the control of all income derived from the prosecution of its business. There is nothing in the Act which compels an employer to continue in force any contracts theretofore existing between the employer and employee pertaining to the employer's property, to-wit, the income from its business. There is nothing in the Act requiring employers to continue any particular employees in its employment after the effective date, and there is nothing in the Act requiring employees to continue in past employment beyond the effective date of said Act. There is nothing in the Act which gives an employee the right to convert as

his own, to the exclusion of his employer, funds
65 coming into his hands, received by him in the
course of his employment and paid to him for
services rendered by his employer through him.

The employees demanded that the law prescribing minimum requirements be satisfied and the employer expressed its intention to comply with such minimum requirements. So long as the employer does comply with such minimum requirements, the employee has no *legal* right to oppose any "method" used by such employer in such compliance. If the tips, in absence of an agreement, belong to the employer as a matter of law, the employees has no legal right to "protest" against the employer's exercise of ownership over these tips.

Assuming for sake of argument only, as plaintiff contends, that there was no agreement between the employer and employee as to the ownership of these tips after the receipt of the October 22, 1938, notice, the law will regard the funds, so received, as belonging to the person or corporation that in law has performed the service for which the tips were given. The tips were given in consideration of the service performed in carrying bags and similar service. The issue is thus narrowed down to the legal question as to who has performed that service. An answer to that question should solve the problem as to the ownership of the tips.

The company had the legal right, even in the face of a protest, to determine whether or not it would customarily make a charge for the services it intended to render to the public after October 22, 1938. It de-
66 termined it would make a customary charge in
this way: it said in its letter, in effect, that we
recognize that the general public has considered in the

past that it is not entitled to receive Red Cap service without paying for it; and that the public has recognized that there is a charge for it by customarily paying a sum commonly called a "tip"; that, since the public is accustomed to this charge, we here and now adopt that same method of payment by the public as our regular way of charging for our services; and therefore, since we are making this charge, you will collect our charge for us, and when you do so same is in our possession constructively, because it is our charge and you must account to us for our funds. Periodically you will owe us so much money and we will owe you so much money, and upon such accounting we will settle any deficit with you; that such shall be in payment of your wages. Thus upon such accounting the company's charges are then released from its constructive possession to the unconditional ownership of the Red Cap and same is released as payment of wages. The result is the same, under this "method", as would be the result if the employer had required the manual delivery to it periodically of all revenue and it had in turn manually paid the employee his wages with such funds or part thereof (Short, et al, vs. Rochester Taxicab Company, et al, 164 N. Y. Supp. 904). There was no necessity for an acceptance by the Red Caps of the above directions from its employer. The employer had the right to make the charge and to set up the mechanics for its collection and accounting.

67 This suit is bottomed squarely upon the fact that the Red Caps are employees of this company. If they are not employees, then the company certainly does not owe them any wages. The "protest" written by their representative asserts that they are employees of said company. The liability sought to be imposed on this company is by virtue of the fact that it is the employer and has employed these Red Caps to work

for it. The character of the work that they do is carrying baggage and similar assistance to passengers passing through the station of this company. They charge that they perform said service for and on behalf of this company as their employer. They therefore charge that this company, through them as its employees, performs that service of carrying that baggage and otherwise assisting those passengers. They charge that in consideration of the performance of that service by this company, through them as its employees, the persons receiving that service pay therefore sums of money commonly termed "tips". They do not contend that any other consideration is paid to the company or that these "tips" are paid to the respective Red Caps by the respective passengers over and above a customary charge paid to the company or for any other reason other than the fact that the persons making such payment have received a service performed by this company.

Plaintiff contends that in the absence of an agreement between the employer and employee the revenue derived from the service performed by the company be-
68 longed to the employee and not to the company. The company says that such revenue being the sole and only revenue derived from the services which it performed and since it was obligated to pay and intended to pay the employees for performing that very service, such income constituted company income and was subject to its control and disposition; and that when such customary charge is paid to the Red Cap, under such circumstances, it is *constructively* in the possession of the company.

Let us analyze some adjudicated cases concerning "tips", two of which have heretofore been cited to the Court and relied upon chiefly by the plaintiff and some of which

have not heretofore been cited, and consider the underlying reasons upon which these decisions are based and then apply said underlying reasons to the peculiar facts in this particular case and see what result is reached.

In Zappas vs. Roumeliote (Supreme Court of Iowa), 137 N. W. 935, cited by plaintiff, the minor plaintiff had worked as a bootblack under a salary contract and the wages agreed upon were paid him. During his two year employment he turned over to his employer daily all tips. He brought action to recover back such tips and recovered. The jury found "that there was no contract between the parties as to tips, and that the tips were personal gifts to the plaintiff by patrons of the house", which finding the Appellate Court held was sustained by the evidence. The Court held:

69 "We think the Court was right in instructing that the plaintiff would be entitled to *any gifts* in the way of tips, *over and above the regular charge for the service performed*, given to him by patrons of the defendant's place. * * * The plaintiff *did prove* that the tips were given to him as a gratuity, and were not intended for the defendant; and that was all that the law could require of him. * * *. The plaintiff was a young Greek, who had just come to this country. He knew nothing of our language for some time, and did not know for a year that tips given to him were intended by the donors as *gifts* to *him*." Affirmed.

In Ex Parte Farb (California Supreme Court, 174 Pac. 320, 3 ALR 301) the point for decision was the constitutionality of a California statute making it a penal offense for an employer to contract with his servant that tips received by the servant would belong to the employer. The statute was held unconstitutional by a ma-

jority Court (six Judges) with a dissenting opinion by one Judge. The basis for the majority holding was that the statute unconstitutionally interfered with the right of the parties to freedom of contract. No discussion or holding is contained in the opinion as to the ownership of tips in the absence of an agreement except it does refer to with approval the Iowa decision just above. The dissenting opinion in the Farb case, in criticizing such a contract as was condemned by the statute, uses this language:

"* * * by its terms the employer, as the proprietor of the place or service in connection with which the tip is received by his employee, is not entitled to it, *since* he
70 is *already fully paid* for whatever he furnishes *by his regular charges*, which *cover and compensate him* for the fullest measure of promptness, fidelity and courtesy toward his patrons on the part of his employees. To permit him to *exact more* is not only to legalize *an overcharge*, but [illegible] to encourage discriminations in the price and quality of his service as between those of his patrons who do and those who do not submit *to the overcharge*.

In Polites vs. Barlin (Court of Appeals of Kentucky), 149 S. W. 829, cited by plaintiff, Barlin, the employer, operated a shoe shining parlor and the employee, Polites, fifteen years of age, was employed to shine shoes and clean hats. He worked five years and ten months and sued to recover $575.00, the amount alleged to have been received by him in tips during this time and paid by him over to his employer by mistake under the belief that they belonged to the employer. The Trial Court sustained a demurrer to his claims for the tips paid. The petition contained the allegation that "it was the habit of the people who came into appellee's place of business

* * * to give the particular employee who did the work a donation of money, commonly called a "tip", which was a personal gift to the employee, *in addition* to the *price charged* by appellee for the work done; * * *"

The Appellate Court held that

"It clearly appears, from the amended petition * * * that ~~the~~ money which appellant received as tips was a personal gift to him, and he, and not appellee, was entitled to receive ~~it~~; that appellant through a mistake and through a misapprehension as to his right, turned
71 the money over to appellee. If this be true, he is entitled to recover; for it is well settled in this State that, where money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which in law, honor, or good conscience was not due or payable, and which ought not to be retained by the party to whom it was paid, it may be recovered."

The Court held that, under the allegations if supported by proof, plaintiff was entitled to have his case submitted to a jury, and reversed the Trial Court's action on the demurrer.

In Short, et al, vs. Rochester Taxicab Company, et al, In re London Guarantee & Accident Company (Supreme Court, Appellate Division, Third Department, 163 N. Y. Supp. 904) tips were added to the regular salary of a taxicab driver in arriving at his compensation rate under the compensation act. It was stipulated that:

"There was a custom existing in the City of Rochester whereby users of taxicabs, *upon paying their fare*, gave to the drivers gratuities or tips, *which is an amount in*

addition to the fare, and for the personal use of the driver; that such custom was known to the employer at the time he employed Sloat to enter his service; that the average amount of tips so received * * * was 85¢ per day, which sum he was allowed to keep for his own use, *and was not required to account* to his employer for same."

The opinion reflects:

"It is urged that these tips were received, not from the employer as wages, but from the patrons of the taxicab, as a gratuity or gift to the driver. * * * The
72 employer and employee knew that 85¢ per day would be received from tips, and clearly the compensation paid by the employer was based on that assumption. *If the employee* had turned the tips over to the employer, *as probably would have been his duty in the absence of an understanding to the contrary*, the wages of the employee would have been $17.10 a week. If the employee receives from the employer $12.00 and retains the $5.10 in tips, he is getting through or from the employer $17.10 a week; and if the employer paid the employee $17.10 a week, and the tips were turned over to the employer, *the result to each would be the same.* Neither the employer nor the employee contemplated that the employee should receive but $12.00 for his services; each expected that he would receive an average of $17.10 per week.

"The employee could not have received the tips if the employer had not put him in the way of receiving them, and we may well conclude that the tips were an advantage *received from the employer* similar in effect to board, lodging, or rent furnished in addition to the money wages paid * * *. The usual tips have come to be considered a part of the cost of the entertainment

at a hotel or upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them *that it is a part of the wages*, which the employer compels the person served to pay. In effect, therefore, the employer and not the employee alone, is benefitted by the tips usually paid * * *. The whole theory of tipping, as at present made in order to get reasonable service, and is an exaction made or permitted by the employer, *so that his patrons shall help him pay the wages* which is
73 fairly due from him to his employee. The custom and the manner in which the payment of tips is enforced and practiced leads inevitably to the conclusion that *in substance* the tips received *are a part of the wages* of the employee, and are advantages received by the employee from the employer as a part recompense for services rendered * * *. Award affirmed.

In Bryant vs. Pullman Company (Supreme Court, Appellate Division, Third Department, N. Y., 177 N. Y. S. 488) it was held that tips received by a Pullman Car porter are understood by the porter and the company to be part of his "wages" and can be considered as such in determining the compensation to which he is entitled for injuries.

The Court said:

"It is urged, however, that the award rested upon the wrong basis as to tips received by the porter, *which were treated as a part of his wages*, and an ingenious, but unsuccessful attempt is made to distinguish this case from Sloat vs. Rochester Taxicab Company, 177 App. Div. 57, 163 N. Y. Supp. 904. It is urged that in that case it was understood that tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. * * * *Such is the common understanding.* The award should be affirmed."

In Gross' Case (Supreme Judicial Court of Maine, 166 Atl. 55) the issue on appeal was whether, in ascertaining the average weekly wages or earning of a waitress, tips received and retained by her should be considered. It was undisputed that, under her contract of em-
74 ployment, she could retain her tips. The Board included her tips and found her average weekly wages to be $17.13. After considering and citing from many compensation acts and the decisions thereunder under which tips were included in the computation to arrive at the average weekly wages of the employee, the Court pointed out:

"A further provision of our act is that in determining the compensation to be paid, *benefits received from any other source than the employer* shall *not* be taken into consideration. Section 18."

The Court then quoted from the reasoning of the Court in the Sloat case, supra, to the effect that "the whole theory of tipping" is that "* * * patrons help him (the employer) pay the wages which is fairly due from him to his employee." Appeal dismissed.

Thus it appears that in the Zappas case the employer had a regular charge for the services which he perform through the employee, which the employer had received; and that the employee *proved* "that the tips were (a) *over and above* the regular charge, and (b) were given to him *as a gratuity* and were *not intended* for the employer". In the Farb case, the language in the dissenting opinion reflects that *in the ordinary* tipping cases, where the employee is permitted to retain the tips, "the employer is not entitled to it, *since* he is *already fully* paid for whatever he furnishes by his regular *charges*, which cover and compensate him. * * * To permit him to exact

more is * * * to legalize *an overcharge*". In the Polites case, which went off on the pleadings, the em-
75 ployee pleaded that "the tips were a *personal* gift to him" and that same was "*in addition to the price charged*".

From these cases, if they are to be followed as sound law, the legal rule is deducible that, in the absence of an agreement with his employer pertaining to "tips", the employee *may recover when he pleads and proves* that

(a) The employer has a customary charge for the service which has been paid over to such employer as compensation for the service performed.

(b) The sum in controversy is *over and above* that regular charge.

(c) The sum in controversy was a gratuity to the employee, and was not intended as payment for the service rendered by the employer through the employee.

The reasons upon which the decisions were based in the decisions cited by plaintiff, Zappas and Polites cases, are entirely lacking here. If the reasons for the rule are absent here certainly the holding should not be the same.

Plaintiff here has wholly failed to prove ownership of such funds in the employees and therefore did not come within the rule which is deducible from the two cases chiefly relied upon by him. He failed to plead
76 or prove that there was paid over to this company any sum whatever to compensate it for the services it has admittedly rendered to said passengers.

He did not plead or prove that the $38,626.99, which he admits was collected by said Red Caps from patrons at and about defendant's terminal for the period involved, was a sum over and above the regular charge. He failed to plead or prove that this sum of $38,626.99 was intended as a gratuity to the Red Cap and was intended as payment for the services rendered by the company. Not only has plaintiff failed in these material respects, but the uncontradicted evidence, together with common knowledge on the subject, is that in this particular case, which is entirely different from the bootblack cases, the amount which the patron pays in each case, commonly called "tip" is the customary and only charge, and such customary charge, even under the Zappas and Polites cases belongs to the employer as a matter of law in absence of an agreement. The exact amount of the charge in each instance is left to the individual patron; but whatever amount is paid in each case, *same* is a *charge*, customarily expected and paid, for the service rendered by the company *in the particular case.* It is not intended by the patron as a pure gratuity but is intended as a full payment for the service rendered, whoever may be the person rendering it. If the company does not receive such payment, through credit or otherwise, it is deprived of the compensation which the patron intends to be in payment for the service furnished to the patron by the company; and is deprived of its customary charge
77 for such service, as provided for by its letter of October 22, 1938, and which charge it had a right to make provision for.

The company's position, that under the peculiar facts here involved, the revenue received from the service rendered by it through the Red Caps, belongs to it even in absence of an agreement, is sustained in the Short case, supra, page 34, wherein the Court held:

"If the employee had turned over the tips to the employer, *as probably would have been his duty in the absence of an understanding to the contrary*, the wages of the employee would have been $17.10 a week * * * (also * * * in substance the tips received are a part of the wages of the employee * * *."

Also in the Gross case, supra, page 36, the Court held that the "whole theory of tipping" is that patrons help the *employer pay the wages* which is fairly due from him to his employee.

Since this company is the one that performs the service and the sums of money, prescribed by the company in its October 22nd letter as its charge, were paid in consideration of the performance of that service they belong as a matter of law to the company. The company prescribed this charge and claimed its ownership of these funds in the October 22nd letter and exercised its right to ownership of said funds by *prescribing* the "method" of the disposition of its funds. The failure of the employees to agree that these funds belong to the company did not make them any the less property of the company. The only way they could be owned by or belong to anyone else *other than the company* would be by an express agreement to which the company was a party. No such agreement existed after October 22, 1938. The law will not vest title to these funds belonging to the company merely because the Red Caps refuse to concede, admit or agree that the funds did belong to the company. Boiled down and stripped of its verbiage, the "protest" of these employees, interpreted most favorably to the plaintiff, simply said in effect "we won't admit or agree that these tips shall be subject to your control and disposition". That part of the protest insisting that the Wage and Hour Statute

78.

be complied with was so much surplusage as Congress commanded that and the letter did not make it any more imperative upon the company. In other words, the lack of an agreement as to the ownership of these funds, if there was any such lack of agreement, and the resulting right flowing from ownership, the right to control and dispose of them, gives to the funds that ownership where it would necessarily lie *in the absence of* any agreement pertaining to such ownership; that is, the funds constitute income paid by the persons receiving a service rendered by this company in consideration of the furnishing of such service. The money paid was collected by this company's employees, authorized to collect it by the company, for and on its behalf. The letter of October 22, from the company to the employees, authorized them to so collect it for and on its behalf. It is the company's money constructively in its possession but
79 in the actual possession of its agent, the Red Cap. Rather than go through the unnecessary mechanics of manual delivery of the company funds to the company and then manual delivery of them back to the Red Caps, making a round trip, the same legal effect is accomplished in a simpler manner by permitting such Red Caps to retain such company funds as wages or a payment on wages.

While the foregoing, in defendant's opinion, is sufficient answer to plaintiff's claim viewed from a standpoint of ownership of the tips, yet, in the alternative, we suggest the following treatment by way of offset.

The Fair Labor Standards Act does not prohibit in any way the exercise by any party to any suit of the legal right to offset. No mere letter from anyone to another can deprive a party litigant of this legal right even if such letter is termed a "protest". If the mechanics used in this case for any reason do not constitute

"*payment*" of wages by the employer, then the pleadings of the respective employees show that each owed to this employer the respective sums collected by each after October 22, 1938, as "tips" which as a matter of law under the facts belongs to the employer and such employer is entitled to offset same against the claim of each for unpaid wages. One exactly offsets the other. Paragraph VI of the amended complaint shows that during the period in question each Red Cap collected tips,
80 which we say as a matter of law belong to this company (if the employer-employee relationship existed) in a sum equal in each case to the amount of each claim. This balancing of accounts is inescapable on either of two viewpoints, namely, (a) if the employees agreed to the company letter of October 22, 1938, by continuing thereafter in its employment, or (b) if they did not agree to it by continuing in its employment. The funds belonged to the company in either event. In the first place it is by agreement and in the second place it is by operation of law even without an agreement.

The protest against "the method" of payment "made for the reasons set forth herein" gave the specific reason: the legal conclusion that "the law * * * does not authorize the carrier to depend upon others to discharge its obligation * * * with respect to the payment of wages * * *." This employer did not "depend upon others to discharge its obligation with respect to payment of wages". It recognized its obligation and agreed to discharge it in full by the use of the "method" described in its letter of October 22, 1938. In that letter the company exercised its ownership of its funds (the tips) by permitting the Red Caps to "retain" them rather than manually deliver them periodically to the company. It might be argued that the protest was intended to express the view of the Red Caps that the "tips" received from the

public did not belong in law to the company, but such erroneous view of the legal effect of these transactions does not change the fact in law that such tips were company income and funds. The protest is inconsistent within itself in that it asserted (1) that the Red Caps were employees of the company, but (2) that the income or consideration received for the service rendered by employees for the company did not belong to the company. The income, the consideration paid for the service, belongs to the company rendering such service in the absence of an *agreement* to the contrary. If there was a lack of agreement on the ownership of the only income derived from the service rendered by the company, as claimed by plaintiff, such cannot change the fact that the income received for the service rendered by the company belonged to it—the party rendering the service. The claim of the employees that no agreement was had on the ownership of these funds requires that such ownership be placed in law under these facts in the company; and since this company provided for the charge and disposition thereof and performed the service for which the charge was made and paid, the funds belong to the company as a matter of law even if the employees would not agree that such was the case.

81

Conclusion.

It has been suggested by plaintiff that Section 6 of the Fair Labor Standards Act, which provides for payment of wages to employees by employers, should be so literally construed as to nullify the act of The Terminal Company in making payment in the manner prescribed in its notice of October 22nd. In other words, it is argued that the "method" prescribed is at best an indirect and not a direct payment, and that the terms of the statute, strictly construed, require a direct payment. We feel certain that the spirit

82

and intent of the Act is that the employee shall receive certain wages in payment for his services, and if the wages are paid for and on behalf of the employer under any method, not illegal, such is payment of wages by the employer.

Of course every legislative act which involves payment of wages, treats and refers to wages as consideration or remuneration moving from employer to employee. The existence of the relationship assumes that the consideration or pay for the services performed so moves. If the consideration for services did not come from the employer, the latter would not have the right to direct the details and manner of work, and the relationship of master and servant would not exist. All Workmen's Compensation Acts, so far as we know, speak of consideration or pay received by the employee *from the employer*. That is particularly true of our own Texas Workmen's Compensation Act; and yet, despite the language contained therein defining wages as remuneration "which the employee receives *from the employer*" (Article 8309, Vernon's Annotated Texas Statutes) our Texas Courts uniformly hold that tips received from a third person for whom the employer is rendering a service through his employee are within such definition and are *wages* received from the employer. (See *Federal Underwriters Exchange vs. Husted*, 94 S. W. (2d) 540, and authorities cited in support thereof.) Similar authorities from other jurisdictions are found on page 34 and '36 herein.

83 If any one of the propositions asserted by us under Sections I or II of this Brief be correct, the suggestion that we have not complied with Section 6 of the Act must fall. If the tips paid for services performed by us through our employees *were ours* after October 24, 1938, either by contract, the legal validity of

which was merely questioned in the "protest" of October 24th, or by contract which was accepted, despite a protest, by the action of the Red Caps in "thereafter engaging in the handling of hand baggage" or by operation of law, it was within our power to dispose of them as we saw fit. We could have our property applied against wages due or we could have directed the disposition of our property in any other manner that we wished.

In effect, plaintiff argues that under the language of Section 6 of the Act, an employer is not paying wages to an employee even though he is seeing to it that funds in an equal amount belonging to him are received by the employee. If I owe John Ten Dollars and Harry owes me Ten Dollars, and I see to it that Harry pays the full Ten Dollars to John, is it not an unsound argument to say that I have not discharged my debt to John and have not paid him the Ten Dollars I owed him? Is not this exactly the argument plaintiff is making in connection with the "employer to employee" matter, thus seeking to have *form* utterly obliterate *substance*? Surely our Courts will not lend a very attentive ear to such argument.

84 As stated hereinbefore, other grounds supporting the position of defendant are contained in its motion, but we believe the Court would prefer that we confine this Brief to the particular issue discussed.

Respectfully submitted,

ROBERT G. PAYNE,
NETH L. LEACHMAN,
GUS. M. HODGES,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Bldg.,
Dallas, Texas.

Copy Mailed to
Messrs. Hay and Flanagan,
St. Louis, Mo.
W. T. Savage,
Dallas, Texas.

Filed 7 day of June, 1940, at 1 o'clock P. M.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR A NEW TRIAL.

85 Filed June 15, 1940.

(Title Omitted.)

Plaintiff has already furnished the Court with a brief in this case and we will not burden the Court with a repetition of the matters contained therein, but will endeavor to confine ourselves to replying to the new matters in defendant's brief in support of its motion for a new trial. Defendant in its brief discusses two points: First, that the red caps by continuing in the employ of defendant after the service of the notice of October 22, 1938, thereby accepted the terms thereof, and that defendant by carrying out the provisions of that notice has complied with the Fair Labor Standards Act; and second, that even in the absence of an agreement between defendant and the red caps, the tips received by the red caps from passengers in payment of services rendered by the red caps belonged to the company as a matter of law. We shall answer these contentions separately.

I.

(a) The Accounting and Guarantee Notice of October 22, 1938, Never Became a Part of the Employment Contract Between Defendant and the Red Caps as the Latter Protested Against the Arrangement, and the Conduct of the Company and the Men Thereafter Shows That There Was No Meeting of the Minds Thereon and That the Question as to the Right of the Company to Offset Tips Against Wages Remained Open to This Day.

As Your Honor held in your oral opinion, not only does the record show that the red caps refused to accept the terms of defendant's notice of October 22, 1938, but the subsequent conduct of defendant shows that the
86 question as to whether defendant had the right to consider the tips received by the men from passengers as a partial payment of the wages which the Fair Labor Standards Act required defendant to pay remained open to the date of the trial. This is evidenced by Mr. Buckner's letter of December 6, 1939, where he said:

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the Courts and as soon as same is decided we will be glad to negotiate an agreement with the Clerks Union, of which you are the General Chairman for this Company",

and by Rule 16 of the working agreement entered into between defendant and the red caps through their representatives as of January 1, 1940, which provides for the reinstatement of a red cap if he is improperly discharged, and further provides:

"The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act', the carrier is required to pay a wage to the Red Caps over and above any amounts that may be received by them as tips. (Note) This rule shall not be construed as requiring the carrier to reimburse Red Caps for loss of tips, either now or in the future."

The cases of Shuppan vs. Peoria Railway Terminal Company, 30 Fed. (2d) 569, and L. G. Balfour Company vs. Brown, 110 S. W. (2d) 104, on which defendant relies as authority for its contention that the red caps by remaining in the defendant's employ after the notice of October 22, 1938, accepted the terms thereof and are bound thereby, are distinguishable on the facts from the case at bar, since in neither of these cases was there any evidence tending to show that the employers admitted that the changes in the employment contracts there made were in any wise an open question. In fact, in the Balfour case the Court, after quoting plaintiff's letter, which it termed a protest, but which actually was merely a request of defendant that it allow the same bonus on plaintiff's sales as on salesmen's sales, said that after this letter was written, "In so far as the record shows *the dispute ended there*". There was no recognition by defendant that any question as to plaintiff's compensation remained open for later settlement as in the case at bar.

87 Defendant says that the red caps had only two alternatives upon being served with the notice of October 22, 1938: They could either accept the terms thereof or they could leave defendant's employ. We submit that there were several other alternatives, that is, the men could have exercised their right to strike or

could have attempted to settle their differences by negotiations or by leaving the question of defendant's right to offset tips against wages open to be determined by a decision of the Courts. Both the Fair Labor Standards Act and the Railway Labor Act are intended to promote commerce by avoiding strikes to settle labor disputes, and both parties hereto attempted to carry out such purpose by entering into negotiations for a working agreement to govern the relations between defendant and the red caps. The negotiations along this line were initiated by plaintiff herein as the red caps' representative on October 11, 1938, when he wrote defendant's General Manager advising him that he had been designated by the red caps as their representative and requesting a conference for the purpose of reaching a working agreement under the terms of the Railway Labor Act. There was considerable delay in reaching an agreement and no agreement was ever reached by the parties as to whether defendant had the right to credit tips against the minimum wages required to be paid by the Fair Labor Standards Act as is evidenced by Mr. Buckner's letter of December 6, 1939, and Rule 16 of the working agreement effective January 1, 1940.

It is evident that if defendant thought that its right to such credit was settled by the men's acceptance of the terms of its notice of October 22, 1938, Mr. Buckner would not have made the statement which we have quoted in his letter of December 6, 1939, nor would he have entered into the working agreement on behalf of defendant, wherein it is recognized in Rule 16 that the question of defendant's right to credit tips against wages was one to be decided by the Courts. If defendant considered that the question of its right to offset tips against wages was settled by its notice of October 22, 1938, would it have executed this agreement with Rule 16 a part thereof?

The conduct of defendant clearly shows that it considered this question an open one and is an implied admission that the unilateral notice of October 22,
88 1938, never ripened into binding contract because it was never accepted by the men.

(b) Even If the Terms of the Notice of October 22, 1938, Were Accepted by the Red Caps, the Carrying Out of the Terms Thereof Was Not a Compliance by Defendant With the Fair Labor Standards Act.

The case of Ex Parte Farb, 174 Pac. 320, cited by defendant on the point that an employer may lawfully require his employee to agree to turn over his tips to his employer, and the case of Zappas vs. Roumeliote, 137 N. W. 935 are, of course, not binding on this Court. We have failed to find any other cases on the question, but we cannot refrain from urging on the Court that such contracts should be held void as tending to work a fraud on the public. Certainly when a person gives a tip to an employee, he intends said tip to be the employee's property, and he greatly resents it if he learns that his tip is turned over to the employer. In fact, such contracts border closely on obtaining money by false pretenses, for certainly the employer endeavors to keep the fact that he requires the tips to be turned over to him concealed, for if he did not there are very few tips the employee would receive. We submit that such contracts should be held void as being contrary to public policy and that the dissenting opinion in the case of Ex Parte Farb, Supra, should be the law. We quote part of this dissenting opinion:

"The contract . . . is one which is in its essence unconscionable and fraudulent, and is also one which in many, if not most, instances is devoid of that very ele-

ment of freedom as to one of the parties by which it is sought to be justified. It is unconscionable because by its terms the employer, as the proprietor of the place or service in connection with which the tip is received by his employee, is not entitled to it, since he is already fully paid for whatever he furnishes by his regular charges, which cover and compensate him for the fullest measure of promptness, fidelity and courtesy toward his patrons on the part of his employees. To permit him to exact more is not only to legalize an overcharge, but is also to encourage discriminations in the price and quality of his service as between those of his patrons who do and those who do not submit to the overcharge. *It is fraudulent in respect to those patrons because it secretly aims to take from them that which they intended for another*, and because its effect is to destroy the very incentive for doing those things for which the gratuity was given. . . ." (Italics ours.)

But even if this Court does not go to the extent of holding all such contracts void, we believe it should do so where the intention of such contracts is to evade the requirements of a minimum wage law by attempting to apply such tips to the payment of wages which the law requires the employer to pay, for contracts, the purpose of which is to deprive the employee of the benefits of such laws, are uniformly held to be void. City of Glendale vs. Coquat, 52 Pac. (2d) 1178; Larson vs. Rice, 100 Wash. 642, 171 Pac. 1037. The notice of October 22, 1938, shows, and defendant, in effect, admits that its purpose was to reduce the payments of wages which the Fair Labor Standards Act required it to make and to substitute for the wage payments required to be made by it a plan whereby the employee would receive most of his compensation from tips which were given him by passengers and were intended to be gratuities to him.

89

It is unecessary, however, for the Court to decide whether a contract whereby an employee is required to turn over his tips to an employer is valid because the notice of October 22, 1938, does not require the red caps to turn over their tips to the defendant, but merely says to the red caps in effect: "You are privileged to retain your tips as you have always done, but with this difference: We will credit the amount of said tips against the minimum wage which the law requires us to pay you, and if you do not receive sufficient tips to equal the minimum wage, we will make up the difference". There is nothing in the notice stating that the men must turn over their tips. On the contrary, the notice specifically states that the men are privileged to retain their tips. The only limitation, in effect, sought to be made on this privilege was that the men must consider these tips as part payment of wages, so that the defendant would only have to make up the difference between the tips and the minimum wage. Thus, in the final analysis, the accounting and guarantee arrangement devised by the railroads to evade their liability under the Fair Labor Standards Act is an attempt by them to write into the Act a provision that tips received from passengers are to be considered as wages paid by the railroads. Defendant, of course, will say that this is not its effect, contending that the arrangement provides for the turning
90 over of tips by the men to the extent of the amount of the minimum wage. The notice does not, however, as we have pointed out, so provide. Stated briefly, the notice is to the effect that "The carrier . . . guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided (that is, as tips), will not be less than the minimum wage provided by law", and that the men are "privileged to retain, subject to their being credited on such guarantee,

all such tips or remuneration . . . except such portion thereof as may be required . . . for taxes". There is not a single word in the notice about the men turning over their tips. The notice merely states that the carrier guarantees that the amount of tips reported, plus the sum paid by defendant will not be less than the minimum wage. In other words, defendant was merely expressing its opinion and belief that tips were wages which could be considered as received in partial discharge of the minimum wage required to be paid by the Fair Labor Standards Act.

Furthermore, the conduct of defendant clearly shows that it construed the notice of October 22, 1938, as providing for the consideration of tips received from passengers as part payment of wages, for when it appeared, after the accounting and guarantee plan had been carried out by defendant for some four months, that the tips received by all the men came within a few dollars of the minimum wages due, the defendant abandoned the reporting of tips and simply told the men that it would assume, unless reported to the contrary, that the tips received by the men equalled the minimum wage and that if any red cap should receive in tips less than the minimum wage, he should report it to the defendant and the defendant would pay him the difference. (Agreed Statement of Facts, Paragraph IX.) Pursuant to these instructions of defendant, the men did not report their tips for the period from March 1, 1939, to October 15, 1939. We do not see how defendant can contend that during this period, when tips were not even reported, the men turned over their tips to defendant even constructively, as obviously they retained them as payment of their wages and defendant merely agreed to
91 make up any difference between the tips and the wages, if there was any, and such fact was

reported to it. It is apparent that defendant during this period was proceeding on the theory that the tips received by the men from passengers could be considered as wages paid by the defendant, and it is likewise apparent that even during the two periods when tips were reported, they were merely considered a partial payment of wages, and that defendant did not consider that the men were turning over their tips to defendant by reason of any contract so to do, as it now contends. It is a distortion of its terms to attempt to construe the notice of October 22, 1938, as requiring a turning over, even constructively, of the tips by the men and the paying back of the money received in tips by the defendant to the men as wages. The notice is nothing more nor less than an attempt on the part of the defendant to make tips wages, which, as Your Honor has said, Congress did not do. As Your Honor also held, it is inconceivable that Congress, entirely familiar with the system of tipping in America, should include in the definition of wages in Subdivision M of Section 204 of the Act the reasonable cost of furnishing the employee board, lodging or other facilities and fail to include tips, if it intended to permit the employer to avoid the payment of the minimum wage by paying him only the difference between his tips and the minimum wage.

II.

It Is Not the Law That in the Absence of an Agreement Between the Employer and the Employee, Tips Received by the Employee in the Course of His Employment Are the Property of the Employer, But on the Contrary, Such Tips Are the Property of the Employee.

Not only is defendant's contention that in the absence of an agreement between an employer and an employee,

tips received by the employee in the course of his employment in cases where the employer makes no specific charge for the service rendered by the employee, are the property of the employer, without authority to support it, but it is contrary to such authorities as there are on the subject and entirely opposed to the prevail-
92 ing practice in the past and the conduct of the parties for many years. Defendant attempts to make much of the statement in the case of Zappas vs. Roumeliote, Supra., where the Court said: "We think the Court was right in instructing that the plaintiff would be entitled to any gifts in the way of tips over and above the regular charge for the service performed given to him by patrons of the defendant's place", the allegation of plaintiff's petition in the case of Polites vs. Barlin, 149 S. W. 829, to the effect that the tips received by plaintiff were personal gifts to the employee in addition to the price charged by the employer for the work done, the statement in the dissenting opinion in the Farb case to the effect that the employer is not entitled to the tip received by the employee since he is already fully paid for whatever he furnishes by his regular charges, and the statement in the case of Sloat vs. Rochester Taxicab Company, 177 Appeals Division 57, 163 N. Y. Sup. 904, referring to the tips as being given by passengers in addition to the fare. Defendant argues that since these cases involved a situation where the tip was in addition to a charge made by an employer for the service of his employee, they in effect held that where there is no charge made by the employer for the service rendered by the employee, the tip is not the property of the employee, but is the property of the employer. It is true that defendant makes no specific charge for the service rendered by the red caps, but if this service imposes any cost on the defendant, it will undoubtedly be paid therefor by charges made against the railroads using its

terminal and owning its stock who of necessity must pay the operating expenses of defendant's terminal. Hence, it is not correct to say that defendant receives no pay for the service of the red caps simply because it does not make any specific charge therefor.

It just so happened, as is usually the case, that in the cases relied on by defendant the employers there did make a charge for the service furnished, so that the tip received by the employee was in addition to a
93 charge made by the employer. The mere fact that the Courts in the course of their opinions in these cases referred to this fact does not mean that tips are the property of the employee where a charge is also made by the employer for the service furnished, but are the property of the employer where the employer makes no charge. We have heretofore referred to the fact, of which we believe the Court will take judicial notice, that the tip giver intends the tip to be for the employe and not for the master, even in those cases where the employee receives a wage, and *a fortiori* in those cases where the employee receives no wages at all. Why should the defendant here be entitled to the tips contrary to the intention of the donor? Can A claim a gift which I give to B? Furthermore, why should the defendant be entitled to such tips when it pays no wage to the employee- What has it done to earn the tip? Defendant on Page 72 of its brief says that it was obligated to pay and intended to pay the red caps for the services rendered by them, and therefore, it was entitled to their tips since it got no other revenue from their services. This statement is rather surprising in view of defendant's position throughout the trial that the red caps were not its employees, that they were not engaged in interstate commerce, and that it was not obligated to pay them anything under the Fair Labor Standards Act.

Defendant says, and we do not dispute it, that it had the legal right to determine whether it would make a charge for the service of the red cap after October 22, 1938. Some of the railroads have done so by requiring the red caps to charge and collect from the passengers the sum of 10¢ for each bag carried. This is the plan which has been adopted by the Terminal Railroad Association of St. Louis and by the terminal companies at Cincinnati and Kansas City. This money, of course, belongs to the company and must be turned over by the red caps to the company. The company then pays the red cap his minimum wage in full regardless of how much he has collected from passengers at 10¢ for each bag carried. It is, however, stretching things too much
94 for defendant to say that the tips voluntarily paid by passengers are charges made by the defendant for the service of the red caps. In the first place, tips have always been considered to be gratuities which are given as a reward for good service which the donor is under no obligation to give, while a charge is compulsory and if not paid can be enforced by legal process. Furthermore, if defendant wants to make a charge for the service of the red caps, since the Court has held that these men are engaged in interstate commerce, the service rendered is a transportation service, and defendant can make no charge therefor until it has first filed with the Interstate Commerce Commission proper tariffs showing the charges which it will make, and these charges must be uniform, so that all passengers will pay the same charge for the same service. Thus, the Interstate Commerce Act requires (U. S. Code, Title 49, Section 2) that it is unlawful for any common carrier directly or indirectly by any special rate *or other device*, to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or

property than it charges, demands, collects or receives from any other person or persons for doing for him or them a similar service. Section 6 (7) of the Act also prohibits any carrier from engaging or participating in the transportation of passengers or property in interstate commerce unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published as required by the Act, and also prohibits the carrier from charging one person more than another for like service. It is obvious that there is no uniformity in tips for similar services, as the size of the tip depends upon the generosity of the one giving it. If these tips are to be considered as charges made, collected or received by the defendant, then the defendant is guilty of two violations of the Interstate Commerce Act since it is discriminating by receiving more from one passenger than from another for the same service, and since it has no right at all to charge for this transportation service in the absence of a tariff filed with the
95 Commission. The record shows that the red caps were instructed by defendant's station master to furnish such service as the passengers requested, even though they gave no tips therefor, and if the tips received may be said to be charges made by the defendant for the services of the red caps, then the defendant is guilty of another violation of the Interstate Commerce Act, since it is discriminating by furnishing free service to one passenger while it receives charges for like services from another.

Defendant relies on an obiter dictum statement in the case of Sloat, et al, vs. Rochester Taxicab Company, et al, (Sup. Ct., Appellate Division, 3rd Department), 163 N. Y. Sup. 904, to the effect that it probably would have been the duty of the employee to turn over his tips to the employer in the absence of an understanding to the

contrary. This statement is pure dictum because the facts there were that it was the custom and understanding between the employer and the employee that the gratuities or tips received by the employee were to be retained by him for his personal use. Consequently, the Court did not have before it for decision the question as to whom the tips belonged in the absence of a custom or understanding that they belonged to the employee. Furthermore, the Court said that in the absence of an understanding it *probably* would have been the duty of the employee to turn his tips over to the employer, indicating that the Court did not seriously consider the question and was just expressing its offhand opinion. The point in this case actually decided by the Court was that tips were to be included in arriving at the average weekly earnings of the employee under the New York Workmen's Compensation Act. The Court's decision turned on the point that the word "wages" and the word "earnings" were used synonymously in the New York Law, saying: "We must give further attention to Section 14. In three of its five subdivisions it speaks of the average annual earnings of the employee, indicating that the Legislature saw no broad distinction between the word 'earnings' and the word 'wages'; and under the facts of this case no distinction between them is apparent". The Court also said: "The Court should treat these tips in the same manner in which the employer and employee treat them, as a part of the compensation to be received by the employee for the service rendered by the employer, a part of the wages, a part of the average annual earnings of the employee". The definition of "wages" in the New York Act is similar to that in the Texas Act, the word "wages" being defined as follows: "The money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reason-

96

able value of board, rent, housing, lodging or similar advantage received from the employer". The Court held that the tips received by the employee were an advantage received from the employer.

In the case of Bryant vs. Pullman Company, cited by the defendant and decided by the same Court, 177 N. Y. Sup. 488, the Court followed the Sloat case and held that the tips received by the Pullman porter were to be considered as part of his wages. This decision was likewise based on the fact that the words "wages" and "earnings" were deemed synonymous in the Act and the tips were considered to be an advantage received by the employee from the employer.

In Gross' case, also relied on by defendant, 166 Atl. 55, the Court also based its decision upon the fact that the Maine Compensation Act used the word "earnings" as well as "wages", saying (166 Atl. 1. c. 56): "The Maine Compensation Act uses the term 'wages, earning or salary'. The word 'earnings' occurs in the English Act. . . . This word has been interpreted before the passage of our Act to include tips. Penn vs. Spiers and Pond, Ltd., 1 K. B. 766". The Court held that tips were earnings and adopted the reasoning of the Court in the Sloat case that they were an advantage received from the employer.

The decision in the case of Federal Underwriters Exchange vs. Husted, 94 S. W. (2d) 540 that tips received by an employee were to be considered in figuring the basis of the employee's compensation under the Texas Workmen's Compensation Act was likewise based on the fact that the Texas Act includes in the definition of wages "other advantage which can be estimated in money", which the Court felt was broad enough to include tips.

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It will thus be seen that the four Workmen's Compensation cases cited by defendant holding that tips are to be considered in figuring the benefits due the employee under Workmen's Compensation laws are all distinguishable from the case at bar because the Fair Labor Standards Act does not use the broad term "earnings", but rather, the restricted term "wages", and further because Section 3 (m) of the Act, defining the word "wage", does not contain any broad language such as "other advantage" received by the employee from the employer as do the compensation acts.

On Page 79 of its brief defendant says that plaintiff has failed to prove ownership of the tips in the employees because he did not prove that there was paid over to defendant any sum whatever to compensate it for the services rendered to passengers, and failed to prove that tips received by the employees were in addition to any regular charge made by defendant for such services. Defendant further says that the plaintiff failed to prove that the tips were intended as a gratuity to the red caps and were not intended as payment for services rendered by the company. Plaintiff submits that it was not necessary for him to prove that the defendant made any charge for its services, for as we have shown, there is nothing in the cases on which defendant relies which requires that a tip given to an employee be in addition to a regular charge made by the employer for the service in order that the tip may be the property of the employee. We submit that all these cases meant when they said that the employee was entitled to any gifts in the way of tips over and above the regular charge for the service performed was that the regular charge belonged to the employer and that anything in excess thereof was intended to be a gift to the employee and would be considered as such. These cases are not authority for the proposition

that tips are the property of the employer where the employer makes no specific charge for the service. The record is sufficient to show that the tips received by the red caps from passengers were intended as gratuities to the red caps and were not intended as payment for any service rendered by the defendant. The record shows that for more than thirteen years the men had been receiving tips and had been retaining them. It is also a matter of common knowledge, of which the Court should take judicial notice, that tips given an employee are intended as gratuities to the employee and not as payment to the employer for any services the tipper may receive.

98

Defendant in its brief (Page 81) says that the company prescribed a charge for its service in its letter of October 22, 1938. There is nothing whatsoever in the letter which says anything about charging passengers for the service rendered by the red caps, and as a matter of fact, the red caps were instructed by defendant's station master to render whatever service a passenger requested even though the passenger did not tip the red cap therefor.

The Supreme Court of Iowa in the case of Zappas vs. Roumeliote, 137 N. W. 935, said that the burden of proof is on the employer to show an agreement on the part of the employee to turn over his tips to the employer. This burden defendant in this case has wholly failed to sustain, and for that reason the tips must under the cases be considered to be the property of the red caps.

Plaintiff respectfully submits that the decision and judgment of this Court heretofore entered were correct

and that defendant's motion for a new trial should accordingly be overruled.

CHARLES M. HAY,
S. D. FLANAGAN,
E. D. FRANEY,
W. I. SAVAGE,
Attorneys for Plaintiff.

506 Olive Street,
St. Louis, Missouri.

Copy mailed to Messrs. Robertson, Leachman, Payne, Gardere and Lancaster, Dallas, Texas.

APPLICATION FOR LEAVE TO AMEND AND FILE COUNTERCLAIM.

99 Filed June 7, 1940.

(Title Omitted.)

To the Honorable Court:

Now comes the defendant, The Union Terminal Company, and applies to the Court for leave to file an amended answer and counterclaim, and for trial of the issues raised thereby, and shows the Court:

I.

That in its original answer defendant alleged facts showing a contract between it and the Red Caps and that it believed and still believes that such a contract existed and was effective. Further that even though it be held that no contract was in effect between defendant

and the Red Caps, nevertheless plaintiff's petition shows on its face that such Red Caps have collected during the period in question $38,626.99 which sum was paid by patrons of this defendant in payment for services rendered to such patrons by this defendant, and which sum in law belongs to this defendant; and that such sum exactly offsets, the amount of wages claimed by the Red Caps; that with the application of such offset, no wages will be due plaintiff. That while defendant believes that its right to such offset appears on the face of plaintiff's pleadings as well as in proof, yet out of an abundance of precaution, defendant asks leave to amend its answer so that it may formally plead such offset and in the event it should be held that such a pleading is necessary, defendant's right thereto will be preserved.

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II.

The failure to file this counterclaim at an earlier time was not due to inexcusable neglect and justice will be served if defendant be allowed to amend setting up the counterclaim as is set out in the copy of said amendment and counterclaim attached hereto as Exhibit "A".

III.

That no hardship will be worked by allowing the filing of said counterclaim and a trial thereon; that such counterclaim may be decided without the necessity of any additional proof thereon, upon the record already before the Court.

Wherefore, defendant prays that it be allowed to file its amended answer and counterclaim presented herewith

and that the final judgment herein include a disposition of such counterclaim.

GUS M. HODGES,
ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

This motion served by mailing a copy to plaintiff's counsel together with copy of proposed amended answer and counterclaim.

June 7, 1940.

101 EXHIBIT "A".

Defendant's Amended Answer and Counterclaim.

(Title Omitted.)

I.

Defendant denies the allegations of Paragraph I of Plaintiff's Amended Complaint, and shows that the alleged action is not one coming within "The Fair Labor Standards Act of 1938" or of any other law of the United States regulating Interstate Commerce.

II.

As to Paragraph II of plaintiff's Amended Complaint, defendant admits that A. J. Pickett is the General Chair-

man of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; defendant denies that the "Fair Labor Standards Act of 1938" is applicable to the cause; defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of Paragraph II.

III.

As to Paragraph III of Plaintiff's Amended Complaint, defendant admits that it "is a corporation organized, existing and doing business under the laws of the
102 State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas"; defendant admits that it employed the persons named, and says said named persons did work for it as such employees in and around defendant's premises during the times mentioned as red caps, handling the baggage and traveling effects of persons entering and leaving its premises. Defendant denies all of the allegations of said paragraph except as expressly alleged or explained above.

IV.

Defendant denies the allegations of Paragraph IV of Plaintiff's Amended Complaint.

V.

Defendant denies all of the allegations of Paragraph V of Plaintiff's amended complaint, except as hereinafter specifically set out:

(a) Prior to October 24, 1938, the defendant delivered a notice, a copy of which is hereto attached and marked

Exhibit "A", to each of the Red Caps set out in Plaintiff's amended station, notifying them that defendant guaranteed to each of them continuing work as Red Caps after October 24, 1938, that they would receive as compensation not less than the minimum provided by the Fair Labor Standards Act; that said Red Caps should report to defendant the amount of tips and renumerations collected by them each day, and that instead of turning such tips and renumerations in to defendant, said Red Caps should retain all such tips and renumerations subject to being credited upon the guaranteed compensation and subject also to the requirement that each Red Cap pay to defendant the amount of taxes imposed by law upon Red Caps and required by law to be collected by defendant.

103 (b) Thereafter pursuant to such notice the Red Caps and each of them reported each day to defendant the number of hours worked and the amount of tips and renumeration collected; and such Red Caps were allowed to and did retain for their own use and benefit all such tips and renumerations collected by them while working about defendant's premises instead of turning them in to defendant; in addition, for each work period between October 24, 1938, and October 24, 1939, during which the tips and renumerations collected and retained by each Red Cap did not equal the number of hours worked multiplied by twenty-five cents (25 cents), the defendant paid to each of such Red Caps an amount equal to the difference; and for each work period after October 24, 1939, during which the tips and renumerations collected and retained did not equal the number of hours worked multiplied by thirty cents (30 cents) defendant paid to each Red Cap the difference; so that defendant has fully complied with its guarantee and has paid to and each Red Cap has received not less than the

minimum provided by the Fair Labor Standards Act, notwithstanding such Act is inapplicable to them.

(c) With regard to the table of figures set out in Paragraph V of Plaintiff's Amended Complaint, defendant shows that it has not yet completed a full check of such figures, but that subject to possible minor differences revealed by such check and subject to its denial that the titles used as headings for the columns are appropriate or applicable, defendant admits that the named persons worked as Red Caps the number of hours set forth; that the amounts under the heading "Total Wages Earned" are the correct result of multiplying the hours worked by twenty-five cents (25 cents) and thirty cents (30 cents) as shown; that the amounts shown in the next column were actually paid to the persons named by the defendant; and that the amounts in the last right hand column are the correct remainders when the amounts in next to last column are deducted from the
104 amounts in the preceding column. Any part of the next to last column attributable to taxes paid, constitutes taxes imposed upon the individual Red Cap and required by law to be collected by the defendant.

VI.

As to Paragraph VI of Plaintiff's Amended Complaint, defendant shows that each of said Red Caps named received in excess of the amount shown opposite, in tips and renumerations, otherwise defendant denies the allegations of said paragraph.

VII.

Defendant denies all of the allegations of Paragraph VII of Plaintiff's Amended Complaint and all of the prayer of said complaint.

Defendant's Counterclaim.

VIII.

Defendant shows that in the event it be held that there was no contract by virtue of the notice given by defendant to the Red Caps as set out above in Paragraph V hereof and the action of said Red Gaps in continuing to work after October 24, 1938, receiving, reporting and retaining tips collected and accepting payments from the defendant, and it should be further held that the disposition by defendant of the tips collected did not constitute the payment of a wage to the said Red Caps:

(a) That each of the particular Red Caps involved herein owes to defendant the particular amount set opposite his name below, as each of them received said amount belonging to defendant, as payment to defendant for services rendered by it to the various parties making such payments, and each of said Red Caps has and retains said amounts set opposite his name and is withholding same from the defendant to defendant's damage in the total amount of Forty Thousand Dollars and No Cents ($40,000.00).

105 (b) The amount owed defendant by each of said Red Caps as money had and received by each from October 24, 1938, through March 6, 1940, and belonging to defendant, is as follows:

Foster, James	$ 962.70
Johnson, Isaac	962.19
Franks, J. C.	1,010.02
Brigham, J. W.	1,010.17
Brooks, Lemuel	970.37
Johnson, A. R.	974.17

Jefferson, John	998.23
Alexander, O. A.	976.95
Jackson, Joe	986.33
McIntosh, Nathan	952.09
Turner, Nelson	974.48
Thomas, Allen	958.92
Williams, Richard	1,018.20
Hollingsworth, Ulyssus	917.97
Turpin, J. T.	832.50
Campbell, Dave	863.42
Fields, Nelson	910.71
Robertson, C. H.	738.13
Hunt, Haywood	981.57
Spears, Donale	994.94
Hynson, Clinton,	970.68
Curry, J. P.	984.52
Langston, Charles	909.72
Muckelroy, Charles	910.12
Jackson, Felix	991.37
Brigham, Paul	960.97
May, Arthur	961.00
Jones, Theodore	677.70
Cameron, Tilson W.	773.90
McMurray, William	151.94
Amos, Earnest	797.94
Barton, Harry	955.88
Wells, Adolphus	809.44
Connor, Alphonso	935.77
McNiel, Lawrence	892.50
Busby, Cornelius	518.02
Jackson, Columbus	988.39
Mathews, Everett	926.73
Southern, Frank	955.96
Campbell, Scott	9.00
Barton, H. N.	965.55
Kelton, Silas	196.35

Bailey, Frank	438.80
Ellston, Russell	1,008.39
Total	$38,626.99

Wherefore, defendant prays that plaintiff take nothing and that defendant have judgment adjudicating that none of the persons named in plaintiff's second amended complaint have any claim against defendant, and for all costs; and in the alternative defendant prays that if any judgment is had against it, that it have judgment against each of said Red Caps in the respective amounts set out opposite the name of each and that same offset the claim of each herein for wages and for costs.

ROBERT G. PAYNE,
106 GUS. M. HODGES,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE & LANCASTER,
Attorneys for Defendant.

Amended answer served on plaintiff by mailing a copy to plaintiff's attorneys.

June 7th, 1940.

ORDER OVERRULING DEFENDANT'S APPLICATION FOR LEAVE TO AMEND.

107 Filed June 17, 1940.

On this the 17th day of June, 1940, came on to be heard the Defendant's Application for Leave to File

Amended Answer and Counterclaim herein, and the Court having heard said Application and being fully advised in the premises, it is Ordered that said motion be and it is hereby overruled.

To the foregoing order overruling Defendant's Application for Leave to File Amended Answer and Counterclaim, the defendant in open Court objected and excepted.

WM. H. ATWELL,
Judge of the United States District Court for the Northern District of Texas, Dallas Division.

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL.

108 Filed June 17, 1940.

(Title Omitted.)

To the Honorable Court:

Now comes The Union Terminal Company and with leave of Court and files its amended motion for new trial moving the Court to set aside the judgment rendered herein and grant a new trial, on the following grounds:

I.

The Court erred in holding that this defendant employer's notice of October 22, 1938, given to each of its Red Cap employees setting out the terms and conditions of their future employment did not bind the latter in law by their conduct in continuing in service, collecting, reporting and retaining tips, and accepting payment of

the difference between the income received from tips and the minimum wage requirements from the defendant, because such clearly was a notice specifying conditions of future employment which in law was binding upon those employees thereafter continuing in service and accepting wages paid and based thereon, and said Red Caps rejected their only alternative of exercising their right to quit work if dissatisfied with the terms of future employment prescribed by the employer in said notice.

109 II.

The Court erred in holding that the letter of protest written to defendant employer on October 24, 1938, by A. J. Picket had the effect of depriving defendant of its right, exercised in its October 22nd notice, of prescribing the terms of future employment for its employees; because the Red Caps, by continuing in the service, accepted the conditions of such notice and such conduct had the legal effect of contradicting anything said or implied in said protest letter; and further because, in any event, said protest letter does not purport to be or does not amount to a refusal to be bound by the terms imposed upon them in their future employment, but is merely a statement of a legal opinion that the legal effect of the method prescribed is not in compliance with the Fair Labor Standards Law.

III.

The Court erred in failing to hold that, regardless of whether or not there was an agreement to the terms of the October 22nd notice, the defendant complied with the Fair Labor Standards Law; because if, as held by the Court, the Red Caps are defendant's employees it must

follow that the service rendered the patrons is furnished by the employer defendant; that, unlike gratuities given over and above the price of the service, the tips were given in payment of the service rendered by defendant through the Red Caps, hence such payments for such service belonged in law to defendant, the one furnishing the service, and it had the right and power to control and dispose of such income belonging to it, which right and power it exercised by applying same on wages. It was unnecessary for it to follow the formality or mechanics of having such payments manually delivered to defendant and then manually delivering it back to the Red Caps as wages, as the method prescribed and followed had that legal effect.

110 IV.

The Court erred in rendering judgment for the plaintiff herein for wages in the sum of $38,626.99 because the plaintiff wholly failed to discharge the burden placed on him by law of alleging and proving that the $38,626.99, admittedly received by the Red Caps during the period, was paid to the Red Caps as a gratuity and was an amount over and above the amount paid by such patrons to and received by the company as compensation for the service rendered by the company to the patron through the Red Cap.

V.

The Court erred in holding that each of the Red Caps for whom this action is brought, was "engaged in commerce"; because the service performed by said Red Caps is purely local, forming no part of any interstate commerce and on the contrary is independently arranged for, directed and compensated for, not included in the

price of ticket or arranged with and as a part of the interstate journey.

VI.

That under the pleadings and evidence, even though it be found that there was no contract making the retention of tips a payment of wages and that in the absence of such contract the tips collected and retained by the Red Caps were not wages paid them, still it appears as a matter of law that said Red Caps, while acting in the course of their employment for defendant collected payments made by the defendant's patrons in the form of tips for services rendered to the patrons by the defendant through the Red Caps, which payments as a matter of law belong to defendant and which exactly offset any claim for wages by plaintiff, so that a new trial should therefore be granted. In the alternative, if the
111 Court holds that such offset should be formally set up by way of counterclaim, defendant asks the Court to grant a new trial herein and allow a trial on the issues raised by defendant's counterclaim in accordance with defendant's application for leave to file and be heard on such counterclaim.

VIII.

Without waiving its position that no recovery should have been allowed but still insisting on same, defendant submits that in any event the Court erred in rendering judgment for "liquidated damages" in the amount of $38,626.99 over and above what was found by the Court to be unpaid minimum wages, because the evidence shows that defendant in good faith pursued a plan which it reasonably believed to be in compliance with the Fair Labor Standards Act, and in the defense of this action

was in good faith litigating and seeking a judicial determination of a bona fide existing controversy as to whether or not there was due from it any "unpaid minimum wages" under the Fair Labor Standards Act, and should not in such circumstances be subject to the harsh penalties of the so-called "liquidated damages".

Wherefore, Defendant prays, that the judgment herein be set aside and a new trial granted; and in the alternative defendant prays that it be allowed to file a counterclaim herein and have a trial on such counterclaim so that it may be disposed of in the final judgment herein.

ROBERT G. PAYNE,
GUS M. HODGES,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

This motion served on plaintiffs by mailing a copy of same to plaintiff's counsel.

June 17, 1940.

ORDER OVERRULING DEFENDANT'S AMENDED MOTION FOR A NEW TRIAL.

112 Filed June 17, 1940.

On this the 17th day of June, 1940, there came on to be heard the Defendant's Amended Motion for a New Trial, and the Court having heard the same and the

argument of counsel thereon, it is Ordered by the Court that said Motion be and it is hereby overruled.

To the foregoing order overruling Defendant's Amended Motion for a New Trial, the defendant in open Court objected and excepted.

WM. H. ATWELL,
Judge of the United States District Court for the Northern District of Texas, Dallas Division.

AGREED STATEMENT OF FACTS.

113 Filed July 22, 1940.

115 In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

vs. No. 248-Civil.

The Union Terminal Company, a Corporation.

Appearances:

Hay & Flanagan, St. Louis, Missouri, and W. T. Savage, Dallas, Texas,
Representing the Plaintiffs.

Robertson, Leachman, Payne, Gardere & Lancaster, Dallas, Texas,
Representing the Defendant.

Transcript of proceedings had before Judge William H. Atwell, at Dallas, Texas, in the above matter on May 27, 1940.

The Court:

Call the matter set.

(Which was done by the Clerk, and announcement of ready was made by both sides.)

116 The Court:

Let me have a little statement of the case, gentlemen, if you please. I know generally what it is, but I would like to have a statement.

Mr. Flanagan:

The plaintiff in this case, if Your Honor please, is general chairman of the Brotherhood of Railway Clerks, and has been duly authorized by the Red Caps, who are employed at the Union Terminal Station of the Defendant here in the City of Dallas, for the purpose of bringing this suit under the Fair Labor Standards Act. The suit is one for wages for the minimum scale of wages set forth in the act, based upon 25 cents an hour for the first year that the Act is in effect, and 30 cents an hour thereafter. The Plaintiff in this case claims that all of these men were employed by the Defendant as Red Caps from the Month of October, I think the 22nd of October, 1938, up until the present time. The wages from the 22nd day of October, 1938, up until the 6th day of March, 1940, is claimed. The evidence will show that prior to the enactment of the Fair Labor Standards Act these men were carrying baggage to and from trains operating in and out of this station. The evidence will show that the only compensation that they received prior to the enactment of the Fair Labor Standards Act was the tips or gratuitous that they received from passengers traveling back and forth through the station. The evidence will show that on October 22, 1938, the date the Act went into effect, the defendant served notice upon these
117 men that they would have to report the tips that they received, and that they would make up

the difference between the amount of the tips and the amount that they would have earned or did earn at the rate of 25 cents per hour. The evidence will show that two days later Mr. Pickett, acting in behalf of these men, and at their request, notified the defendant that they protested that arrangement and that it was not acceptable to them. The evidence will show that the defendant did not discharge any of these men after the protest was filed, but continued them in the service, and thereafter paid them small amounts of money ranging from perhaps $1.00 to three or four dollars each pay day, which represented the difference between the amount that they collected in tips and what they would have earned at the rate of 25 cents or thirty cents an hour. The evidence will show that there were negotiations under the Railway Labor Act for an agreement between the company and these men, and that those negotiations continued up until the first day of January of 1940 at which time there was a working agreement entered into in writing between the parties. The evidence will show that during all of this time that the men had protested against the action of the company in failing to pay them the minimum wage provided for under the Fair Labor Standards Act. The evidence will show that on the first day of January, 1940, when this written agreement was entered into that in Section 16 of that agreement, a copy of which will be submitted to Your Honor, that the matter was still in dispute and left open, such an ar-
118 rangement that if any man was wrongfully discharged and it was determined that the Fair Labor Standards Act applied to these men, then they would be reimbursed, whatever out-of-pocket, except they would not be paid any lost tips. The evidence will show, I think, on December 6, 1939, Mr. Murrell Buckner, who was Vice-President and General Manager of the defendant company, wrote Mr. Pickett a letter advising him that

they would enter into an agreement with these men under the Railroad Labor Act, whenever the dispute in question was settled by the Courts.

Of course, as far as we have been able to ascertain this is the first case in the United States that has proceeded to trial. So that, the evidence will also show that the trains operating in and out of this station were engaged in interstate commerce, that the men under the instruction of the Station Master were required to unload baggage—I should not say baggage, but I should say unload the personal effects or traveling bags of passengers from these trains, from the platform to the ground at the station, and in many instances they were required to carry these bags for people who paid them nothing in the form of tips; that they were instructed that if the people asked them to do it they would have to do it whether they were paid or not.

The evidence, I think, will show that in many instances there were old people, sick people or cripple people going to and from these trains, traveling from various parts of the United States, and that these men carried the
119 baggage for, and had instructions to carry it for them, and that they received nothing for it.

The evidence will show that the relationship of the employer and employee existed between the plaintiffs and the defendant. The evidence will show that these men were required to do many things which involved the relationship of master and servant, and which indicated that they were working in interstate commerce. We will also have for introduction the findings of the Interstate Commerce Commission with reference to this class of employees which is referred to as ex parte 72, and I think that finding was on December 20, 1937. These cer-

tified copies of the record of the Commission and its findings will show that the defendant company was a party to that proceeding.

The evidence will show the amount of money that these men would have earned at the rate of 25 or 30 cents an hour, the amount that would pay to them at various times by the defendant in the form of wages and taxes, and the balance which we claim is due them.

Now the parties in this case, if Your Honor please, have worked out an agreed statement of facts which we feel will shorten the trial of the case, and the original of which we would like to file with the Court for your reference as you may see fit to inspect it.

We have agreed that the number of letters and documents are the originals or exact copies of originals, and that they may be used in evidence without the
120 necessity of proving them. We ask leave to file with Your Honor this agreed statement of facts.

The Court:

Don't file it with me, but call my attention to parts of it.

Mr. Payne:

Most of the matters that Mr. Flanagan referred to are covered by that stipulation, some of these I do not consider material. I would like to say with reference to defendant's position, that in June, 1938, this Fair Labor Standards Act was passed to provide what Mr. Flanagan says is a minimum wage of 25 cents per hour. It was to go into effect on October 24, 1938. On October 22nd Mr. Buckner, acting for the Union Terminal Company,

served on each individual Red Cap a notice calling his attention to the Fair Labor Standards Act, and calling to his attention the fact that certain wages were due, and guaranteeing to each individual Red Cap that so long as he performed the service, such as carrying baggage for the Union Terminal Company, that he would receive that wage that Congress had provided for, subject, however, to this provision, that the Red Cap could retain but would have to report to the Terminal Company any tips that were paid the Red Cap, and such tips were to be credited on the guarantee of the Union Terminal Company covering the wage and that the company would pay the difference.

Mr. Flanagan says Mr. Pickett, representing that he was acting for the Red Caps, wrote a letter on October 24th saying that he was not agreeable to the
121 terms of the proposal that we submitted on October 22nd, but nevertheless the Red Caps continued to work, they continued to collect their tips and reported their tips and received the cash or checks for the difference between the tips and 25 cents or 30 cents per hour as the case may be, and we say that they have been paid in full sixty and seventy dollars per month right along from October 23, 1938, until to date.

The Court:

All right, proceed with the testimony. Read your agreement or call your first witness.

Mr. Flanagan:

I wish to offer in evidence, if Your Honor please, the first paragraph of the Agreed Statement of Facts as follows:

"It Is Agreed that the figures shown in Paragraph Five of plaintiff's Second Amended Complaint as to the number of hours worked by each Red Cap are true and correct; that the column in Paragraph Five, headed 'Total Wages Earned', correctly reflects such hours worked multiplied by Twenty-five Cents ($0.25) as to hours worked prior to October 24, 1939, and by Thirty Cents ($0.30) as to hours worked after that date; that the column in Paragraph Five, headed 'Total Wages and Taxes Paid by Defendant', correctly represents the amounts received by said Red Caps of defendant over and above tips; that the column headed 'Balance Due' correctly represents the difference between the amounts set forth under the column headed 'Total Wages Earned' and the amounts set forth under column headed 'Total Wages and Taxes paid by Defendant'; that said Red Caps collected tips
122 from persons using defendant's station equal to or greater than the amounts set out under the column headed 'Balance Due'. It is understood that the defendant does not agree that the titles used as column headings in Paragraph Five of plaintiff's Second Amended Complaint are properly applicable or are correctly stated."

Mr. Flanagan:

We next offer in evidence the Second Paragraph of the Agreed Statement of Facts as follows:

"It Is Agreed that during the period mentioned in plaintiff's second amended complaint the red caps referred to therein were engaged in carrying baggage of persons into and out of said station from point to point within the station, and to and from trains entering and leaving defendant's station or of persons going from one train to another at defendant's depot; that some of said red caps occasionally engaged in wheeling sick and infirm

passengers to and from trains in wheel chairs; that only such passengers as so desired availed themselves of such services; that some of the trains entering and leaving defendant's station moved in interstate commerce and some in intrastate commerce."

Mr. Flanagan:

We next offer in evidence the Third Paragraph of the Agreed Statement of Facts as follows:

"It Is Agreed that the defendant is and was during the period referred to in plaintiff's second amended complaint a corporation organized under the laws of the State of Texas for the purpose of engaging in and carrying on a terminal passenger, baggage and mail service for the railroads owning its stock; and it
123 does and did during said period carry on such a business. The stock of defendant is owned by the following railroads: The Texas and Pacific Railway Company; Missouri-Kansas-Texas Railroad Company of Texas, Gulf, Colorado and Santa Fe Railway Company, The Chicago, Rock Island and Gulf Railway Company, St. Louis-Southwestern Railway Company of Texas, Texas and New Orleans Railroad Company, St. Louis, San Francisco and Texas Railway Company, and Fort Worth and Denver City Railway Company; that the defendant owns a depot, buildings, tracks, engines and other properties necessary to its business. The above named railroads operate trains in, out and through defendant's yards and station, some of said trains moving in interstate commerce and some in intrastate commerce. Defendant did during the period involved herein sell railway tickets for and on behlaf of the above named roads; some of the tickets are for trips to points within the State and some of the tickets are for trips to points out of the State, a substantial volume of both classes of tickets being sold."

Mr. Flanagan:

We next offer in evidence the Fourth Paragraph of the Agreed Statement of Facts, as follows:

"It Is Agreed that plaintiff, A. J. Pickett, is the authorized agent and representative of the red caps named in the plaintiff's second amended complaint, and is their duly authorized agent and attorney in fact authorized by them to bring this suit under Section 16 (b) of the Fair Labor Standards Act of 1938."

124 Mr. Flanagan:

We next offer in evidence Paragraph Five of the Agreed Statement of Facts, as follows:

"It Is Agreed that by a common understanding between defendant and the said red caps and between themselves, the red caps wear and did during the period referred to in plaintiff's second amended complaint wear uniform blue shirts and red caps furnished by themselves."

Mr. Flanagan:

We next offer in evidence Paragraph Six of the Agreed Statement of Facts:

"It Is Agreed that Plaintiff's Exhibit "A" attached hereto is a true and correct copy of a collective working agreement in force and effect after January 1, 1940, between the defendant and the red caps mentioned in plaintiff's second amended complaint and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and executed by A. J. Pickett, General Chairman, and executed by defendant's Vice-President and General Manager, Murrell L. Buckner. It is agreed that Exhibit "A" represents the first collective working agreement entered into between the defendant and said red caps or Brotherhood."

Mr. Flanagan:

We next offer in evidence Paragraph Seven of the Agreed Statement of Facts, as follows:

"It Is Agreed that the following is a true and correct copy of the original letter directed and delivered by the defendant to each of the red caps named in plaintiff's amended complaint on October 22, 1938. (Being Exhibit "F" attached hereto.)

125 "Dallas, Texas, October 22, 1938.

"To: Red Caps,
The Union Terminal Company.

"In view of the requirements of the Fair Labor Standards Acts, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amount received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to en-

gage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

"THE UNION TERMINAL COMPANY,
By MURRELL L. BUCKNER,
Vice-President & Gen. Manager."

Mr. Flanagan:

We next offer in evidence Paragraph Eight of the Agreed Statement of Facts, as follows:

"It Is Agreed that the following is a true and correct copy of the original letter received by the defendant on October 24, 1938, and that it was directed to the defendant by A. J. Pickett, General Chairman, and said letter may be treated as though it were the original letter:

"The Union Terminal Company System Board of Adjustment Brotherhood of Railway and Steamship Clerks,

126 A. J. Pickett, General Chairman,
709 Equitable Building,
St. Louis, Mo.

"October 24, 1938.

"Mr. Murrell L. Buckner,
Vice-President and General Manager
The Union Terminal Company,
Dallas, Texas.

"Dear Sir:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22, 1938, and which

was handed to each employee to whom it was addressed: i. e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by persons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

"Fair Labor Standards Act:

"Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest

against the method proposed by the carrier to meet its obligation under the said law, and since it ap-
127 pears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein.

"Yours truly,

"(Sgd.) A. J. PICKETT,

General Chairman."

Mr. Flanagan:

We next offer Paragraph Nine of the Agreed Statement of Facts, as follows:

"It Is Agreed that subsequently to the letter set out above in Paragraph VII, defendant prepared and furnished to the red caps, 'Red Cap Time Slip' forms, one of said forms being attached hereto and marked Exhibit "B"; that defendant required the said red caps to fill in the blanks of said forms and to return one of said forms filled in showing hours worked and tips collected during the day, for each day worked thereafter through February 28, 1939. That prior to March 1, 1939, defendant prepared and furnished to the red caps, 'Red Cap Time Slip' forms, one of said forms being attached hereto and marked Exhibit "C"; that prior to March 1, 1939, defendant advised the red caps that defendant would assume unless reported to the contrary, that for each work period after February 28, 1939, each red cap collected in tips at least an amount equivalent to the number of hours worked multiplied by twenty-five cents (25 cents), and that should any red cap receive less than said amount during any work period he should report it to defendant and defendant would pay to such red cap an amount equal to the difference between
128 the amount of the tips collected and the amount represented by multiplying the number of hours

worked by twenty-five cents (25¢) and further that each of said red caps should fill in one of said forms showing the hours worked during the day for each day worked. It is agreed that during the period from March 1, 1939, to October 15, 1939, inclusive, each of said red caps collected in tips during each work period an amount equal to or in excess of the number of hours worked during the work period multiplied by twenty-five cents (25¢). It is agreed that defendant prior to October 16, 1939, furnished to the red caps the 'Red Cap Time Slip' forms as attached hereto marked Exhibit "D" and instructed the red caps that on and after October 16, 1939, each of them was to fill in the blanks on said forms and return to defendant showing the number of hours worked and the amount of tips collected during the day.

"It is further agreed that during the period from October 24, 1938, through February 28, 1939, and from October 16, 1939, through March 6, 1940, each of said red caps did fill in and return to defendant each day worked one of said 'Red Cap Time Slip' forms using the form of Exhibit "B" for the former period and the form of Exhibit "D" for the latter period, showing the number of hours worked and the amount of tips collected during the day; that during the period from March 1, 1939, through October 15, 1939, each of said red caps did fill in and return to the defendant each day one of said 'Red Cap Time Slip' forms attached hereto
129 marked Exhibit "C", showing the number of hours worked during the day. It is agreed that defendant kept a payroll record of the information reflected in said Exhibits "B" and "C" and "D" for such period beginning October 24, 1938, and through March 6, 1940.

"It is agreed that during the period from October 24, 1938, through October 23, 1939, that defendant stood

ready to and did pay to each red cap, for each work period during which the amount of tips collected by said red cap amounted to less than the number of hours worked multiplied by twenty-five cents (25¢), an amount equal to the difference between the amount of tips collected and the number of hours worked multiplied by twenty-five cents (25¢); that during the period from October 24, 1939, through March 6, 1940, defendant stood ready to and did pay to each red cap, for each work period during which the amount of tips collected by such red cap was less than the number of hours worked multiplied by thirty cents (30¢), an amount equal to the difference between the amount of tips collected and the number of hours worked multiplied by thirty cents (30¢)."

Mr. Flanagan:

We next offer in evidence Paragraph Ten of the Agreed Statement of Facts, as follows:

"It Is Agreed that prior to and during the period referred to in plaintiff's second amended complaint, defendant prepared and furnished to the red caps, 'Red Cap Checks', a true copy of which is attached hereto marked Exhibit "E". Said checks were and are used by the red caps in handling the baggage and effects of persons using defendant's station where said persons do not accompany the red cap."

130 "When the red cap accompanies the person whose baggage or effects he is carrying such checks are not used. Such checks are not and have no connection with the baggage checks given for baggage delivered for transportation under the baggage tariffs and carried in the baggage car."

Mr. Flanagan:

We next offer in evidence Paragraph Eleven of the Agreed Statement of Facts, as follows:

"From And After October 28, 1938, defendant issued free transportation to the red caps upon application by them. A true copy of the application form used is hereto attached marked Exhibit "G"."

Mr. Flanagan:

We next offer in evidence Paragraph Twelve of the Agreed Statement of Facts:

"It Is Agreed that this Agreed Statement of Facts and also the exhibits referred to herein may be introduced in evidence by either party and all matters and things therein contained considered in evidence as though formally introduced in evidence through other means, subject to objection by either party on the grounds of irrelevancy and immateriality, and no other.

"It Is Further Agreed that both parties reserve the right to introduce such other evidence at the trial as they may desire not inconsistent with this stipulation."

(Said Agreed Statement of Facts were signed by the following parties:)

W. T. SAVAGE,
CHARLES M. HAY,
S. D. FLANAGAN,
E. D. (?) FRANEY,
Attorneys for Plaintiff.

ROBERT G. PAYNE,
GUS M. HODGES,
JOHN C. ROBERTSON,
Attorneys for Defendant.

Mr. Flanagan:

We offer in evidence the various exhibits that are referred to in that Agreed Statement of Facts. The first one is Exhibit "A" which is the Union Terminal Company's working agreement between The Union Terminal Company and Brotherhood of Railway Clerks and Steamship Clerks, etc. This is marked PLAINTIFF'S EXHIBIT "A", and I particularly call attention to Rule 16, which is found on Page Eight, and which reads as follows:

"If the final decision decrees that the charges against the Red Caps were not sustained, the record shall be cleared of the charge; if suspended or dismissed the red cap shall be reinstated with seniority and rights unimpaired. The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the "Fair Labor Standards Act", the carrier is required to pay a wage to the red cap over and above any amounts that may be received by them as tips. (Note.) This rule shall not be construed as requiring the carrier to reimburse red caps for loss of tips, either now or in the future."

132 I call that to Your Honor's attention. First, it refers to these men as employees, and, secondly, it shows that the question now involved is an open question, considered an open question between the parties, wherein the red caps were contending that they come under the law, and the company apparently that they were not.

I also call Your Honor's attention to Rule No. 23, as follows:

"Red Caps and those dependent upon them for support will be given the same consideration in requesting free transportation as is granted others in the service.

"General committees representing Red Caps will be granted the same consideration in requesting transportation as is granted general committees representing employees."

Then I call Your Honor's attention to Page 12 at the conclusion of the agreement where it shows, "Accepted for Union Terminal Company, W. C. Young, Station Master."

And then, "Approved: Murrell L. Buckner, Vice-President and General Manager, The Union Terminal Company."

And following that: "Accepted for the employees and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (and signed by) A. J. Pickett, General Chairman. D. W. Estes, Division Chairman. L. H. Akers, Assistant General Chairman. Harry M. Barton, Committeeman. Clinton Hynson, Committeeman. James Foster, Committeeman. Dallas, Texas, January 1, 1940."

133 Mr. Flanagan:

We next offer in evidence Exhibit "B", PLAINTIFF'S EXHIBIT "B", which is the time slip referred to in the Agreed Statement of Facts, and it is captioned, "The Union Terminal Company Red Cap Time Slip." Then it has the name with a blank line and the number referring to the number of red caps. The hours worked from ..... to ..... Tips received $..... Date..... And then says:

"I hereby certify and affirm that I did on the above date receive from divers persons the total sum of $..... for services performed in my capacity as red cap, while

in the employ of the Union Terminal Company, that the above statement is correct and that I worked on said date only the hours stated."

And then a blank line and then right under it the words, "Red Cap."

Mr. Flanagan:

We next offer in evidence PLAINTIFF'S EXHIBIT "C", which is also a time slip but a little different from the one just read, and it reads:

"The Union Terminal Company. Date ..... Hours on duty from ..... M. to ..... M., showing four of those lines."

And then says: "Total hours worked" ....., and then a blank line to be signed by the Red Cap and right under it the words, "Red Cap".

I call attention to the fact that on this slip there is no provision for reporting the tips. That, I think, was the one used between March 1, 1939, and October 15, 1939.

134 Mr. Flanagan:

We also offer PLAINTIFF'S EXHIBIT "D", which is another Red Cap time slip, and the language of that is practically the same as the language in Plaintiff's Exhibit "B", the first time slip I read.

I next offer in evidence PLAINTIFF'S EXHIBIT "E", which is a baggage check that was referred to. It shows on this the number of the baggage check and says, "In case of error advise by wire without fail and return to Station Master The Union Terminal Company, Dallas, Texas."

And on the opposite side the number and, "In case of error advise by wire without fail and return to Station Master, The Union Terminal Company, Dallas, Texas."

(That is a stub to the one first quoted.)

On the reverse side of this exhibit it shows, "Porter No. ..... Car ..... Sec. ..... Train ..... and Date ....."

Mr. Flanagan:

We next offer in evidence PLAINTIFF'S EXHIBIT "F", which is a letter dated October 22, 1938, and which I read to Your Honor from the Agreed Statement of Facts. (To which reference is here made.) That was a letter that was given to each of the employees by the Company.

We also offer in evidence the letter set out in the Agreed Statement of Facts in answer to that, and which does not have an exhibit number, because it was agreed that we set it out as an original in the agreed statement.

Mr. Payne:

We object to that letter purely and solely on the ground of its immateriality. I suppose Your Honor would not consider it if it is immaterial anyway.

135 The Court:

It is presented by both sides as an alleged ground for estoppel, or whatever might be found, and I overrule the objection.

Mr. Flanagan:

Now, if Your Honor please, we offer in evidence PLAINTIFF'S EXHIBIT "G", which is an application for transportation or free passes, and it reads:

"Form 26. The Union Terminal Company's Employees Application for Transportation. Employees, in making request for transportation will please bear in mind the following general conditions: Employees in service less than six months will not be furnished with transportation."

And then there is a blank line for the date of the application and the official of the company's name it is addressed to, and says: "Please furnish me transportation consistent with this company's rules", and in parenthesis, show names of ages of children and indicate sex. And then it has the word "For" and a blank after it, and "From blank to blank and return and from blank to blank and return via blank, and good until blank." And says, "I hereby certify that the above named person is my ....., a member of my family, residing with me, and entirely dependent upon me for support, (unemployed) and understand that the interstate commerce law permits issuance of interstate transportation only to railroad employees and dependent members of their families, and that any person not entitled thereto under the law who uses free or reduced rate transportation is subject to a penalty of from $100.00 to $2,000 for each offense. This is my ..... Application during the calendar year ....." And says, "This form is printed in order to eliminate the necessity for letters of transmittal. The purpose should be observed."

136

And it shows a place for the applicant to sign and a place for the party to sign approving the application.

Mr. Flanagan:

I call Your Honor's attention to the Agreed Statement of Facts which shows in Section 11 that they were issuing these free passes from and after October 28, 1938.

Now, if Your Honor please, since we drew up this Agreed Statement of Facts, there have been some other letters that are pertinent to certain issues, and we agreed that we might read them without the necessity of putting witnesses on the stand, and treat them in the same manner as we treated these other exhibits, subject to the objection as to their immateriality, etc., of course.

Mr. Flanagan:

We next offer in evidence, if Your Honor please, Plaintiff's Exhibit "H", which is a letter addressed to The Union Terminal Company, Dallas, Texas, and signed by each of the Red Caps involved in this suit, notifying the company that Mr. A. J. Pickett was acting in their behalf for the purpose of discussing a working agreement such as is indicated in Exhibit "A", which is as follows:

137 PLAINTIFF'S EXHIBIT "H".

Dallas, Texas, October 11, 1938.

To The Union Terminal Company,
Dallas, Texas.

Greetings:

The Undersigned, Employed by the Union Terminal Company, Dallas, Texas, in the capacity of "Red Caps", do hereby and herewith, designate the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station, as our duly authorized and accredited representative for the purposes set out in the several sections of the Railway Labor Act, 1934, Amended, and the said organization is hereby authorized to enter

into negotiations with our employer, for the purpose of making a working agreement covering our conditions of employment, and to do any and all other things in connection therewith that will have for its purpose the making and maintenance of an agreement between the carrier and its undersigned employees. This authorization is irrevocable, unless and until a majority of the employees shall have invalidated its force and effect as provided for in the Railway Labor Act, 1934, Amended:

Name—Address.

Everett Matthews, 3014 State Street.
Joe Jackson, 1525 Juliette St.
O. A. Alexander, 2400 Metropolitan St.
J. W. Fuller, 3709 Atlanta St.
Harry Barton (28), 2212 Caddo St.
138 Adolphus Wells (42), 2837 Oakdale St.
Williams McMurray (27) 200 Flora St.
Frank Bailey (54).
J. W. Brigham (19), 1136 N. Bitterton Circle.
Alfonso Connor (29), 4204 Shenandoah.
Columbus Jackson (24), 2417 So. Harwood St.
Charles Muckleror, 3519 Meadow St.
Nelson Turner, 1914 Johnson St.
Terry Guy (?), 1016 Dodd St.
Phillip Jackson (13).
Charlie Lan (?), 3513 Lafayette St.
J. C. Franks, 2600 Caddo St.
Clinton Hynson (?), 3701 Watt St.
Haywood Hurt (?), 1811 Ball St.
Tilson W. Cameron, 112 Cliff St.
Paul W. Brigham, 1136 N. Bitterton Circle.
Isaac Sam Johnson, 3500 Edgewood St.
Arthur May, 3033 Thomas Ave.
Oscar Morris, 917 Bogel St.

Allen Thomas, 3112½ Thomas Ave.
Russell Elston, 1205 Dey St.
Cornulius Bushy, 3421 State St.
Donald Spears, 1912½ Boll.
Harry Barton (53), 2709 Munger St.
139 Richard J. Williams, 3026 Warren Ave.
Silas Kelton, 2711 Munger St.
A. R. Johnson (32), 3400 Edgewood St.
Nathon McGrath, 1400 Daile.
Jim Morgan, 3308 Cockran.
L. T. Price (Prince) (50), 1907 N. Washington.
Theodore Jones (44), 2304 Caddo.
Lens Brooks (35), 3703 Havana St.
James Foster (20), 1114 Dale St.
C. H. Robertson (7), 2711 Munger Ave.
Lawrence McNeil, 3911, 3911 Munger Ave.
Sam H. Williams (58), 2711 Munger Ave.
Frank Southern (14), 2231 Dathe St.
Scott Campbell (30), 2417 Allen St.
John A. Jefferson (17), 4116 Sutton St.
J. C. Curry (8), 1535 Caldwell.
J. T. Turpin (43), 1807 Fairmount St.
Nelson Fields (51), 3500 Edgewood St.
Earnest Arnold, 3614 State St.
Ulyssus Hollingsworth (52), 4008 Munger St.
Dave Campbell (31), 3715 Meadow St.

Mr. Flanagan:

We next offer in evidence, Plaintiff's Exhibit "I", being a letter dated October 11, 1938, addressed to Murrell Buckner and signed by A. J. Pickett with reference to ICC Ex Parte No. 72, Order of September 29, 1938, which is as follows:

140 PLAINTIFF'S EXHIBIT "I".

October 11, 1938.

Subject: ICC Ex Parte No. 72 (Sub-No. 1) Order of September 29, 1938, including Employes carried as Red Caps under the Railway Labor Act.

Mr. Murrell L. Buckner,
Vice-President and General Manager,
The Union Terminal Company,
Dallas, Texas.

Dear Sir:

By approximate order, the Interstate Commerce Commission did on September 29, 1939, find that "Red Caps" were employees of the carrier within the meaning of Paragraph 5 of Section 1 of the Railway Labor Act—Amended—1934, and because of the findings of the Commission those employees are privileged under the law to organize themselves into an appropriate bargaining agency and thru the agency selected enter into contractual relations with the carrier respecting the terms of their employment.

The several employees, termed "Red Caps" by the Union Terminal Company, Dallas, Texas, have by appropriate action authorized the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, to represent them in the making of a working agreement as contemplated by the Railway Labor Act—1934—Amended, and we are therefore serving notice upon the carrier this day, of the action of the employees, and advis-

141 ing the carrier that we are prepared to exhibit to it the authorizations that we hold executed

by the employees in question, and we are asking for a conference under the terms of the Railway Labor Act—1934—Amended, for the following purposes:

(1) To exhibit to the carrier the authorizations that we hold executed by the employees, authorizing us to act for them.

(2) For the purpose of negotiating an agreement covering their working conditions and other related subjects.

Please advise me time, date and place that it will be agreeable to hold the conference for the purposes set forth in the foregoing.

Yours truly,

A. J. PICKETT,
General Chairman.

Mr. Flanagan:

We next offer in evidence Exhibit "J", a letter dated December 26, 1938, addressed to Mr. Murrell L. Buckner, Vice-President and General Manager of The Union Terminal Company, Dallas, Texas, which is as follows:

PLAINTIFF'S EXHIBIT "J".

December 26, 1938.

Mr. Murrell L. Buckner,
Vice-President and General Manager,
The Union Terminal Company,
Dallas, Texas.

Dear Mr. Buckner:

Enclosed you will find a draft of the proposed
142 agreement as requested covering the Red Caps.

I am suggesting that we have our initial conference on the agreement on Thursday of this week beginning at 10:00 A. M. I suggest this for the reason that it is necessary for me to be in Chicago on the 4th of January. On the 17th I have a meeting with Grand

Lodge Officers, on the 11th I must meet with our Hospital Board and on the 15th the Annual Meeting of my Board occurs.

Inasmuch as the Texas Legislature will convene shortly after January 1st, I presume that you will be engaged with that body.

I am sure that we can get the matter out of the way in a very short time. Unless I otherwise hear from you I will arrange to be in Dallas on Thursday morning; if this is not satisfactory, will you please wire me by MKT wire at my St. Louis Office?

Thanking you for your advice, I am

Very truly yours,

A. J. PICKETT.

Mr. Flanagan:

We next offer in evidence Exhibits "J-1", "J-2", "J-3", "J-4" and "J-5", being proposed agreement referred to in the letter just read, which exhibits are as follows:

PLAINTIFF'S EXHIBIT "J-1".

Agreement

between

143 The Union Terminal Company

and

Its Red Caps, Ushers, Attendants and All Others Engaged in Handling Hand Baggage to and from Passenger Trains, and Otherwise Assisting Passengers in a Similar Capacity,

Represented by

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Rule 1: The rules hereinafter incorporated in this agreement, shall govern the hours of service and work-

ing conditions of the employees of the Union Terminal Company, Dallas, Texas, who are engaged in the handling of hand baggage to and from passenger trains, assisting passengers in and around the station, and performing similar duties, and who shall for the purpose of this agreement be designated as "Red Caps".

Rule 2: Seniority of each employee shall begin at the time service as a Red Cap first begins under the rules of this agreement.

Rule 3: The application of employees shall be approved or disapproved within sixty days after beginning employment.

(It is understood and agreed that all employees now in the service will be considered as being permanently employed without respect to the provisions of this rule.)

Rule 4: Senior employees will have preference in selecting their work assignment. After an employee has designated the shift or assignment upon which he desires to perform service, he may not for a period of ninety days further exercise his seniority rights.

Rule 5: A seniority roster will be posted in January of each year showing the respective standing of each employee. The roster will be open for protest for a period of thirty days after posting and if error exists the carrier will issue a bulletin correcting the error.

(The roster posted in January, 1939, will be open for protest for a period of sixty days, and the dating of each employee will be considered as established unless protest is made within the time limit herein provided.)

Rule 6: All employees covered by this agreement will be embraced in one seniority district.

Rule 7: When forces are reduced seniority shall govern. The junior employees or employee being the first to go out of service in the order of their seniority standing.

Rule 8: When forces are increased employees who have been cut off on account of force reductions will be called back to work, provided, such employee will have filed his name and address with the proper supervising official of the carrier, and will have kept the carrier advised of any change in his address. Employees failing to report for duty within five days after having been notified by mail, telegram or messenger shall be considered out of the service.

Rule 9: Employees who re-enter the service after having resigned, or having failed to comply with Rule 8 will be considered new employees and their seniority will date from their last entry into service.

Rule 10: Eight hours or less shall be considered a day's work.

Rule 11: If as and when it is determined that the employee covered by this agreement are likewise covered by the "Fair Labor Standards Act", time after eight hours on any one day will be paid for at the rate of time and one-half time.

Rule 12: The hours of assignment for each shift or employee will be consecutive, unless by agreement with the duly accredited representative of the employee's.

Rule 13: Employees covered by this agreement will not be required to perform service in any other class or group of employees, nor will employees covered by this agreement be permitted to "double" unless in cases of extreme emergency.

Rule 14: An Extra Board will be maintained and its operations shall be governed by the rules heretofore established for the government of employees employed as Clerks, etc.

145 Rule 15: Employees holding places on the Extra Board will be considered in the employ of the carrier and covered by all rules of this agreement.

Rule 16: Employees covered by these rules will not be disciplined or dismissed without an investigation. The charge against the employee shall be made in writing, and the causes for which must have occurred within sixty days prior to the date of the charge. At the investigation or at subsequent hearing the employee may be represented by the Officers of the organization party to this agreement. At the investigation or at the hearings the employee may produce witnesses, or documents in defense of the charge made. The hearing or investigation shall be one of record, and a copy of the record will be furnished the representatives of the employees. If the charge against the employee is not sustained he shall be reinstated and compensated for all losses sustained, and his record will be cleared of the charge.

It is hereby agreed that the right of appeal to the highest officer of the carrier is hereby established.

Employees who consider themselves otherwise unjustly treated will have the same right of hearing and appeal

as is provided for in this rule, provided, written complaint is made to the proper officer of the carrier within ten days from the cause for complaint.

Rule 17: It is understood and agreed that employees who may elect to handle their cases or grievances individually must, before the carrier can act, comply with all rules of the agreement in the same respect as though the case or grievances were being handled by the organization.

Rule 18: Employees covered by this agreement may be allowed a leave of absence for a period not to exceed sixty days in any calendar year. Leaves of absence in excess of sixty days will only be granted by agreement between the carrier and the duly accredited representatives of the organization representing the employees. (This rule will not apply in cases of sickness or injury.)

146 Rule 19: Employees elected as representatives of the employees will be granted necessary leave of absence for the handling, or consideration of grievances or cases that arise under the rules of this agreement.

Rule 20: Except in the case of extra men called to perform work of another employee, work performed on Sundays and Holidays will be guaranteed at pro rata rates, provided employment existed for the employee on the six days prior to the Sunday or Holiday. This rule shall not apply to new positions or to employees who may exercise rights under the rules of this agreement, or to extra men called to perform the work of another.

Rule 21: Nothing in these rules shall permit the reductions days for employees covered thereby, below six

per week, if assigned on a six day basis. If assigned on a seven day basis, the working week shall be seven days.

Seven day assignments shall exist for a period of not less than thirty days.

PLAINTIFF'S EXHIBIT "J-4".

Rule 22: There shall be no discrimination in the assignment of work, nor shall the carrier discriminate against any employee because of membership in a labor organization.

Rule 23: Employees who are selected as Captains of Shifts or gangs will be allowed a differential of $1.50 per day over and above the guarantee, and they shall be selected from the group by agreement between the carrier and the duly accredited representative of the employees.

Rule 24: It is agreed and understood, that the employees covered by this agreement are employed by and under the direct supervision of the officials of the carrier, and that the employees shall not be restricted in their work, nor shall they be required to perform service on orders other than those issued by the Officers of the Union Terminal Company.

147 Rule 25: Employees required to perform service as messengers away from the property of the carrier shall be allowed a differential over the guarantee of fifty cents per hour, with a guaranteed minimum of one hour for such service performed.

This rule contemplates similar service in connnection with private cars, or any other work at the direction of the carrier away from the property of the carrier.

Rule 26: Employees covered by this agreement will be accorded the same right to request transportation as is accorded other employees in the service.

Rule 27: It is agreed that the employees will keep themselves neat and clean, and to accomplish this, the carrier will furnish clean warm dressing rooms for the convenience of the employees.

Rule 28: Employees required to attend Court or serve as witnesses for the carrier will receive for such service their usual allowance and in addition their expenses, provided they assign to the carrier all fees and mileage that may accrue to them as witnesses.

Rule 29: Employees covered by this agreement will have the same rights to hospital service, and group insurance as is accorded other employees in the service.

Rule 30: This schedule of rules will be printed by the carrier and a copy given to each employee covered thereby. When a new employee is engaged he will be given a copy of the agreement at the time he is employed.

Rule 31: It is agreed that employees who may be injured in the service may be represented in the settlement of the matter by the duly accredited representative of the employees. Employees who are injured in the service will not be required to sign a release before being permitted to return to service.

148 PLAINTIFF'S EXHIBIT "J-5".

Addition Rule 21: Shifts and assignments shall have a regular starting time, and the starting time of any shift or assignment, will not be changed without sixteen hours advanced notice to the employees affected, unless the proposed change is agreed to by and between the carrier and the duly accredited representatives of the employees.

Rule 32: This agreement and the rules and provisions embraced herein shall constitute an agreement in their entirety between the parties designated in the caption of this document, and shall be effective January 1, 1938, and shall continue in effect until changes as provided for in the Railway Labor Act—1934 Amended.

For the Union Terminal Company,

.....

Vice-President & General Manager.

For the Employees,

.....

General Chairman.

.....

Division Chairman.

.....

.....

.....

Committee, Representing the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Dated at Dallas, Texas.

Mr. Flanagan:

Now I wish to read in evidence EXHIBIT "K", a letter dated October 5, 1939, addressed to Murrell L. Buckner, Vice-President and General Manager of The Union Terminal Company, Dallas, Texas, reading as follows:

149 Dear Sir: With further reference to our several exchanges relative to working agreement covering Red Cap employees:

"We have previously furnished you with a copy of our proposal covering this question.

"We are now being called upon to proceed with the negotiation of agreement covering the working conditions of the employees in question.

"We have previously exhibited to the carrier our authority under the law to represent the Red Caps in agreement negotiations.

"Will you therefore please advise me the time, place and date that you are agreeable to entering into negotiations for the purpose of disposing of the matter, under the provisions of the Railway Labor Act—1934 Amended."

"Thanking you for your advice, I am

"Very truly yours,

"A. J. PICKETT."

Mr. Flanagan:

I next offer in evidence PLAINTIFF'S EXHIBIT "L", which is a letter dated Dallas, Texas, October 6, 1939, addressed to Mr. A. J. Pickett as follows:

"Your letter of October 5 in our conversation yesterday. I am taking this matter up today with the execu-

tives and hope to have something definite shortly and will then advise you further.

"Very truly yours,

"MURRELL L. BUCKNER".

150 Mr. Flanagan:

I next offer in evidence Plaintiff's Exhibit "M", being a letter from Murrell L. Buckner, dated December 6, 1937, to A. J. Pickett, which is as follows:

PLAINTIFF'S EXHIBIT "M".

The Union Terminal Company,
Murrell L. Buckner,
Vice-President and General Manager.

Dallas, Texas, December 6, 1939.

Mr. A. J. Pickett,
General Chairman, B. of R. C.,
Box P, Plaza Station,
St. Louis, Mo.

Dear Mr. Pickett:

Referring to our conversation and letter which you showed me from Mr. Harrison in reference to the Kansas City Terminal agreement with the Red Caps.

I have carefully read this agreement and I see nothing in it that is in any way out of line, except that Rule 6 would not apply to this property and Rule 17 is not clear.

As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the Court and as soon as same is decided we will be glad to negotiate an agree-

ment with the Clerks Union, of which you are the General Chairman for this Company.

Very truly yours,
(Signed) MURRELL L. BUCKNER.

151 Mr. Flanagan:

I next offer in evidence Plaintiff's Exhibit "N", which is a certified copy of the findings and order of the Interstate Commerce Commission, and as follows:-

PLAINTIFF'S EXHIBIT "N".

Interstate Commerce Commission,
Washington.

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of notice of the Commission dated December 20, 1937, and attachments, in Docket No. Ex Parte 72 (Sub-No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act, the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 22nd day of May, A. D. 1940.

(Seal)

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

December 20, 1937.

Service of the attached orders and questionnaire is hereby made on the following named carriers, which

have no designated agents in Washington, D. C.,
152 by posting same in the office of the Secretary of the Interstate Commerce Commission.

W. P. BARTEL,
Secretary.

Chicago Union Station Company.
Cleveland Union Terminals Company.
Dayton Union Railway Company.
Detroit Union Railroad Depot and Station Company.
Fort Street Union Depot Company.
Fort Worth Union Passenger Station Company.
Memphis Union Station Company.
Norfolk Terminal Railway Company.
Port Terminal Railroad Association.
Rock Island Frisco Terminal Railway Company.
Union Depot Company.
Union Passenger Depot Company of Galveston.
Union Terminal Company.
Wichita Union Terminal Railway Company.

ORDER.

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 18th day of October, A. D. 1937.

Ex Parte 72 (Sub-No. 1).

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act.

153 The Commission having been requested to determine whether so-called "red caps", station

porters, station attendants, parcel porters, ushers, and other persons whose duties consist of or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties, are employees of the carriers within the meaning of the fifth paragraph of section 1 of the Railway Labor Act.

It is Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this Commission, be, and it is hereby, Ordered and Directed to furnish the information called for in the attached questionnaire with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census, and return the same properly sworn to as indicated in the questionnaire not later than December 15, 1937.

It is further Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this Commission be made parties to this proceeding, also that a copy of this order be served upon each such carrier, and that notice of this order be given to the general public by depositing a copy of the same in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 3.

W. P. BARTEL,
Secretary.

(Seal)

154 Interstate Commerce Commission,
Washington, D. C.

Ex Parte 72 (Sub-No. 1).

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act.

Subject: Hand baggage porters.

Note.—The term "hand baggage porters" as used in this questionnaire means persons whose duties consist of, or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties. These men are variously designated by terms such as "red caps", "station porters", "station attendants", "parcel porters", "ushers", "chief ushers", "captains", etc. They are divided into two classes, A and B, as shown below. It is desired that all questions be answered as to both classes.

Questionnaire.

Exact name of reporting carrier.

.....

Name, title, and address of officer of respondent to whom correspondence concerning this report should be addressed.

.....

(Name)

.....

(Title)

.....

(Address)

Name of station .....

Location of station .....
(City) (State)

155 Class A.

Hand Baggage Porters Who Are Paid Salaries, Wages, or Other Compensation by Respondent.

1. Total number employed on September 1, 1937?

2. By what title or titles are they designated?

A. .....

B. .....

C. .....

3. Their duties, if any, in addition to carrying hand baggage and other articles for passengers?

A. .....

B. .....

C. .....

4. Average number of hours in service per person?

A. Per day .....

B. Per week .....

C. Per month .....

156 5. Salary or wages?

A. Per hour .....

B. Per day .....

C. Per week .....

D. Per month .....

(The entries under 4 and 5 should be in accord with the basis usually employed at the station for which the report is made.)

6. What was the total amount of compensation received from the carrier for services of such employees at the station covered by the return during the month of September, 1937?

7. What was the total number employed at such station during the whole or any part of the same month?

8. Do they also receive tips?

9. Are they permitted to solicit tips?

10. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

11. Are they considered eligible to receive passes?

12. The number who have received passes during the current year?

13. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

14. Who bears the expense of the uniforms, etc., worn?

16. Give title or position of officers or employees under whose supervision hand baggage porters perform services.

17. Are they required to make any kind of application for employment? If so, submit copy of application form and state by whom application must be approved.

157 18. Are they required to pass an examination?

19. Are they subject to certain rules? If so, submit copy of rules.

20. Is discipline imposed for breach of rules? If so, nature of discipline.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.

22. Are any seniority rights or preferences accorded them, based on length of service? If so, specify briefly.

23. Summarize briefly any agreements between carrier and labor organizations regarding wages, rules, and working conditions of persons covered by return.

24. Number who are conceded by the carrier to be employees.

If some are conceded to be employees and others are not, state the distinction.

Class B.

Hand Baggage Porters Who Receive No Compensation Other Than Tips.

1. Total number in service on September 1, 1937?

2. By what title or titles are they designated?

A. .....

B. .....

C. .....

3. Average number of hours in service per person?

A. Per day .....

B. Per week .....

C. Per month .....

158 4. Their duties, if any in addition to carrying hand baggage and other articles for passengers?

A. .....

B. .....

C. .....

5. Are they considered eligible to receive passes?

6. The number who have received passes during the current year?

7. What officer or employees assigns these persons to the service?

8. Give title or position of officers or employees under whose supervision hand baggage porters perform their services?

9. Are they required to make any kind of application? If so, submit copy of application form and state by whom it must be approved.

10. Are they required to pass an examination? If so, state nature of examination.

11. Are they subject to certain rules? If so, submit copy of rules.

12. Is discipline imposed for breach of rules? If so, nature of discipline.

13. Are they disciplined for improper service to passengers? If so, nature of discipline.

14. Are they permitted to solicit tips?

15. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

16. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

159 17. Who bears the expense of the uniforms, etc., worn?

18. Are any required to pay for the privilege of acting as hand baggage porters?

19. If the services of hand baggage porters are engaged by a concessionnaire, so state.

20. Are any seniority rights or preferences accorded them, based on length of service? If so, specify briefly.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.

22. Have any been paid salaries, wages, or other compensation since enactment of the Railway Labor Act on May 20, 1926? If so, state number and other details.

23. Have the salaries, wages, or other compensation of any such persons been discontinued during or since Federal control? If so, state the number and other details.

24. Summarize briefly any agreements between carrier and any labor organizations regarding wages, rules, and working conditions of persons covered by return.

25. Number who are conceded by the carrier to be employees. If some are conceded to be employees and others not, state the distinction.

Note:—If insufficient space is shown for any answer, the additional information may be shown on a supplemental sheet affixed to the questionnaire. Copies of this

questionnaire sufficient for the probable requirements of the various carriers will accompany the order, but if additional copies are needed they will be furnished upon request.

160 Oath.

State of .....,
County of ....., ss.

I, ... (Name of Person), the undersigned, ... (Title) of the..... (Full name of reporting carrier) do on my oath declare that the foregoing returns have been prepared by me or under my direction from the books and records of said..... ..... (Full name of reporting carrier) and from such other sources of information as seemed necessary for complete statement of the facts; that I have carefully examined or caused to be examined each and every statement herewith submitted; and that all of said statements are true and correct to the best of my knowledge, information, and belief.

.....

Subscribed and sworn to before me this ..... day of ....., 19.....

.....

.....

161 ORDER.

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 14th day of December, A. D. 1937.

Ex Parte 72 (Sub-No. 1).

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials That Are to be Included Within the Term "Employee" Under the Railway Labor Act.

It appearing, That by order dated October 16, 1937, returns to a questionnaire in the above-entitled docket concerning information in regard to so-called "red caps", station porters, station attendants, parcel porters, ushers, and other persons whose duties consist of, or include, carrying passengers' hand baggage or other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties, were required to be filed on or before December 15, 1937, by each Class I steam railroad, also each switching and terminal company, and by certain Class A electric railways with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census; and good cause appearing therefor:

It is Ordered, That the period for filing such returns be, and is hereby, extended to January 4, 1938.

By the Commission, Division 3.

W. P. BARTEL,
Secretary.

(Seal)

162 Mr. Flanagan:

We next offer in evidence Plaintiff's Exhibit "O", which is a certified copy of the Interstate Commerce Commission's Order, together with questionnaire filled out by the defendant company, said exhibit being as follows:

PLAINTIFF'S EXHIBIT "O".

Interstate Commerce Commission,
Washington.

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Order of the Commission entered October 16, 1937; and

Return to Questionnaire, filed January 10, 1938, by The Union Terminal Company,

in Ex Parte 72 (Sub-No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act, the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 29th day of April, A. D. 1940.

(Seal)

W. P. BARTEL,
Secretary of the Interstate
Commerce Commission.

163 ORDER.

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 16th day of October, A. D. 1937.

Ex Parte 72 (Sub-No.1)

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be Included Within the Term "Employee" Under the Railway Labor Act.

The Commission having been requested to determine whether so-called "red caps", station porters, station attendants, parcel porters, ushers, and other persons whose duties consist of, or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties, are employees of the carriers within the meaning of the fifth paragraph of section 1 of the Railway Labor Act;

It is Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this Commission, be, and it is hereby, Ordered and directed to furnish the information called for in the attached questionnaire with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census, and return the same properly sworn to as indicated in the questionnaire not later than December 15, 1937.

164 It is further Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this

Commission be made parties to this proceeding, also that a copy of this order be served upon each such carrier, and that notice of this order be given to the general public by depositing a copy of the same in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 3.

W. P. BARTEL,
(Seal) Secretary.

Interstate Commerce Commission,
Washington, D. C.

Ex Parte 72 (Sub-No. 1)

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials That Are to be Included Within the Term "Employee" Under the Railway Labor Act.

Subject: Hand baggage porters.

Note:—The term "hand baggage porters" as used in this questionnaire means persons whose duties consist of, or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties. These men are variously designated by terms such as "red caps", "station porters", "station attendants", "parcel porters", "ushers", "chief ushers", "captains", etc. They are divided into two classes, A and B, as shown below. It is desired that all questions be answered as to both classes.

165 Questionnaire.

Exact name of reporting carrier: The Union Terminal Company.

Name, title, and address of officer of respondent to whom correspondence concerning this report should be addressed: Murrel L. Buckner, Vice-President & General Manager, Dallas, Texas.

Name of station: The Union Station.

Location of station: Dallas, Texas.

Class A.

Hand Baggage Porters Who Are Paid Salaries, Wages, or Other Compensation by Respondent.

1. Total number employed on September 1, 1937.
None.

2. By what title or titles are they designated?
None.

3. Their duties, if any, in addition to carrying hand baggage and other articles for passengers.
None.

4. Average number of hours in service per person.
None.

5. Salary or wages.
None.

(The entries under 4 and 5 should be in record with the basis usually employed at the station for which the report is made.)

6. What was the total amount of compensation received from the carrier for services of such employees at

the station covered by the return during the month of September, 1937?

None.

7. What was the total number employed at such station during the whole or any part of the same month?

None.

166 8. Do they also receive tips?

None.

9. Are they permitted to solicit tips?

None.

10. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

None.

11. Are they considered eligible to receive passes?

None.

12. The number who have received passes during the current year.

None.

13. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

None.

14. Who bears the expense of the uniforms, etc., worn?

None.

16. Give title or position of officers or employees under whose supervision hand baggage porters perform their services.

None.

17. Are they required to make any kind of application for employment? If so, submit copy of application form and state by whom application must be approved.
None.

18. Are they required to pass an examination? If so, state nature of examination.
None.

19. Are they subject to certain rules? If so, submit copy of rules.
None.

167 20. Is discipline imposed for breach of rules? If so, nature of discipline.
None.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.
None.

22. Are any seniority rights or preference accorded them, based on length of service? If so, specify briefly.
None.

23. Summarize briefly any agreements between carrier and any labor organizations regarding wages, rules, and working conditions of persons covered by return.
None.

24. Number who are conceded by the carrier to be employees. If some are conceded to be employees and others are not, state the distinction.
None.

Class B.

Hand Baggage Porters Who Receive No Compensation Other Than Tips.

1. Total number in service on September 1, 1937.
53.

2. By what title or titles are they designated?
Red Caps.

3. Average number of hours in service per person.

a. Per day. 8 Hours.

b. Per week. 56 Hours.

c. Per month. 1680 Hours.

168 4. Their duties, if any, in addition to carrying hand baggage and other articles for passengers.

a. None.

5. Are they considered eligible to receive passes?
No.

6. The number who have received passes during the current years.
None.

7. What officer or employee assigns these persons to the service?
Station Master.

8. Give title or position of officers or employees under whose supervision hand baggage porters perform their services.

Station Master.

9. Are they required to make any kind of application? If so, submit copy of application form and state by whom it must be approved.

None.

10. Are they required to pass an examination? If so, state nature of examination.

None.

11. Are they subject to certain rules?

No.

12. Is discipline imposed for breach of rules? If so, nature of discipline.

If Red Cap is derelict in the performance of his duties he is no longer permitted to serve the traveling public.

13. Are they disciplined for improper service to passengers? If so, nature of discipline.

See answer to Question 12.

14. Are they permitted to solicit tips?

No.

15. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

November 1937, $2216.89.

169 16. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

Cap and Number.

17. Who bears the expense of the uniforms, etc., worn?
Red Caps.

18. Are any required to pay for the privilege of acting as hand baggage porters?
No.

19. If the services of hand baggage porters are engaged by a concessionnaire, so state.
No.

20. Are any seniority rights or preferences accorded them, based on length of service? If so, specify briefly.
None.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.
No.

22. Have any been paid salaries, wages, or other compensation since enactment of the Railway Labor Act on May 20, 1926? If so, state number and other details.
No.

23. Have the salaries, wages, or other compensation of any such persons been discontinued during or since Federal control? If so, state the number and other details.
None.

170 24. Summarize briefly any agreements between carrier and any labor organizations regarding wages, rules, and working conditions of persons covered by return.
None.

25. Number who are conceded by the carrier to be employees. If some are conceded to be employees and others not, state the distinction.

None.

Note:—If insufficient space is shown for any answer the additional information may be shown on supplemental sheet affixed to the questionnaire. Copies of this questionnaire sufficient for the probable requirements of the various carriers will accompany the order, but if additional copies are needed they will be furnished upon request.

State of Texas,
County of Dallas, ss.

I, Murrell L. Buckner, the undersigned, Vice-President and General Manager, of the The Union Terminal Company do on my oath declare that the foregoing returns have been prepared by me or under my direction from the books and records of said The Union Terminal Company and from such other sources of information as seemed necessary for complete statement of the facts; that I have carefully examined or caused to be examined each and every statement herewith submitted; and that all of said statements are true and correct to the best of my knowledge, information, and belief.

MURRELL L. BUCKNER.

171 Subscribed and sworn to before me this 7th day of January, 1938.

HAL K. BIARD,
Notary Public, Dallas,
Texas.

Mr. Flanagan:

We next offer in evidence Plaintiff's Exhibit "P", which is a certified copy of the Interstate Commerce Commission's findings and order in connection with the particular case referred to:

PLAINTIFF'S EXHIBIT "P".

Interstate Commerce Commission
Washington,

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of report and order of the Commission, filed and entered September 29, 1938, in Ex Parte No. 72 (Sub-No. 1), In the Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included within Term "Employee" under the Railway Labor Act, the original of which is now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 30th day of April A. D. 1940.

W. P. BARTEL,
Secretary of the Interstate
Commerce Commission.

(Seal)

INTERSTATE COMMERCE COMMISSION.

172 Ex Parte No. 72 (Sub-No. 1.)

In the Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included Within Term "Employee" Under the Railway Labor Act.

Submitted July 14, 1938. Decided September 29, 1938.

The work defined as that of an employee or subordinate official in the orders of the Commission in effect, defining and classifying employees and subordinate officials, includes the work of persons whose duties consist of, or include the carrying of, passengers' hand baggage at passenger stations in cities of over 100,000 population throughout the United States, and who are variously designated by terms such as red caps, station attendants, station porters, parcel porters, ushers, chief ushers, and captains, and brings such persons within the term "employee" as used in the Railway Labor Act.

George M. Harrison, Horace A. Bacus, Willard S. Townsend, Boland L. Hosie, Leon M. Despres, Joseph M. McMillen, James L. Flynn, Frank Morrison, Fred H. Mandel, and George E. C. Hayes for petitioners.

C. C. Handy, Wallace E. Hughes, B. E. Dwinell, S. C. Murray, J. H. Wright, William Atwill, G. W. Knight, H. H. Bryrer, E. R. Brumley, L. P. McGuire, Sydney R. Prince, Jr., S. W. Sawyer, and T. P. Healy for respondents.

173 REPORT OF THE COMMISSON.

Division 3, Commissioners McManamy, Porter, and Miller McManamy, Commissioner:

Exceptions were filed to the report proposed by the examiners, and oral argument was heard.

Certain employee organizations have filed petitions requesting this Commission to amend or interpret its orders defining and classifying employees and subordinate officials so as to include the work of persons whose duties consist of, or include, carrying passengers' hand baggage and other articles at various passenger stations, and thus bring them within the term "employee" as defined in the fifth paragraph of section 1 of the Railway Labor Act, as amended, which reads as follows:

The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: * * * * *

A questionnaire was served upon all class I carriers and upon practically all railway terminal and station companies, requiring answers under oath to numer-
174 ous questions relative to persons as above described, together with those who direct or supervise the performance of their duties, and who are variously designated by such terms as "red caps", station porters, station attendants, parcel porters, ushers, chief

ushers, captains, and the like. This questionnaire called for the information desired with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census. It provided for separate returns for persons receiving salaries or wages, designated as class A, and for persons whose only compensation is through tips, designated as class B. At the oral argument respondents waived any objection to submitting the proceeding upon the sworn returns to the questionnaire in lieu of oral hearing.

Returns to the questionnaire were filed by about 250 carriers, covering their operations at approximately 350 stations throughout the country. The returns cover information for slightly over 4,300 persons in classes A and B, of which approximately 1,150 are in class A. Some stations have all of these persons on a salary basis in class A, at other stations their only compensation is through tips, placing them in class B, and at still other stations there are persons in both classes. Of 178 stations having persons in one or both classes, 98 stations have a total of less than 10 per station, and there are only 41 stations having over 25. Included in the latter is one with 63 in class A and 345 in class B, one with none in class A and 258 in class B, and one with 75 in class A and none in class B.

175 These persons are accorded the various titles shown above and also other titles by the different companies. The predominating titles applied to both classes are "red caps", ushers, attendants, and porters. The term "red cap" is the one most extensively used for each class. Although some companies designate those in class A differently from those in class B, numerous other companies use the same term for both classes. For example, one company may designate those in class A as ushers and those in class B as red caps, but other companies designate

those in both classes as either ushers or red caps without distinction. Duties in addition to the carrying of passengers' hand baggage are frequently the basis for a distinction in titles. For the purpose of this report the term "red caps" will be used as embracive of all persons covered by the questionnaire, except as head red caps or captains may be specifically designated.

Generally, red caps in both classes are subject to rules, either verbal or written, particularly as regards safety of passengers and baggage, courtesy to passengers, and general conduct of the red caps. They are subject to reprimand, suspension, dismissal, or other penalties for infractions of the rules. At most stations the qualifications of each applicant are carefully considered, and at many of them an examination, written or physical, is required. At least one station company requires applications to be accompanied by a surety bond, the premium on which is paid by the company. At several of the large stations where detailed rules are provided, the red caps are required (1) to learn the time when trains are due
176 to arrive and leave the station, the location of various offices in the station, and other information, in order to intelligently answer inquiries made of them, (2) to ascertain if a passenger boarding a sleeping card has space reservation for that car, and (3) to report to the stationmaster any evidence of damage to baggage received by them under check from baggage cars and any accidents observed by them. In assisting passengers they are restricted to the station premises or to specified points a short distance outside of the station.

Both classes are subject to the general authority of the stationmaster, general manager, superintendent, or officer of similar rank, or their immediate assistants. In a few instances they are subject to the general authority of a division superintendent of a railroad. At the large stations

there are one or more persons designated as head red caps or captains, or by similar terms, who have some subordinate authority over the remainder of the red-cap force, such as the allocation of stations and the making of reports with respect to the time each red cap is on duty, and who sometimes not only recommended men for red-cap service but actually have authority to engage their services in the first instance, but after being engaged or assigned to duty they are all subject to the general supervision of some official of the railway or station company. There is no indication that the authority of any of the head red caps or captains is of a nature to bring them within the terms "official" as distinguished from
177 the term "employee or subordinate official" as used in the Railway Labor Act.

It appears that, except as to the captains or head red caps who do considerable supervising, the principal work of most of the persons in both classes consists of carrying hand baggage, although electric trucks are apparently used for moving such baggage to some extent. Their duties also frequently include moving such baggage to some extent. Their duties also frequently include moving invalids in wheeel chairs when occasion requires and the paging of passengers for telegrams or telephone calls. At many of the stations class B red caps as well as class A red caps are required to assist in cleaning the waiting rooms and rest rooms. They are frequently assigned alternatively to such duties. At some stations they call trains and assist in running elevators. There are some stations at which the red caps deliver telegrams and mail to station officials and do other errands for them. Many of the persons performing red cap duty do so as part-time work in addition to their regular duties as janitors or the like. At three stations the captains in addition to their duties as such are permitted to operate some kind of

concession such as a shoe-shine stand. Persons in each class are usually on duty for a full day of seven or more hours.

The head red caps and captains are on a salary basis at many stations, and in such instances the amount of their salaries depends to some extent, apparently, on their opportunities to obtain tips. Likewise, the amount of the salaries or wages, when such are paid to the general force of red caps, appears to depend on their opportunities to obtain tips. At some stations their wages are merely nominal, amounting to $10 per month or less. At one such station, where the red caps are alternately assigned one day per week to a post not considered desirable from the standpoint of tips, such persons are paid $1 per day for each day so assigned. At another station certain of the red caps are given an allowance of 75 cents per day for meals. At one station their regular compensation is only $1 per year. The persons in both classes are not permitted to solicit tips, except that at a very few stations it is permitted or not prohibited. It should be noted that most of the persons in class A receive tips when voluntarily given. The exceptions are principally head red caps or captains whose duties are mostly of a supervisory nature. The information supplied regarding the amount of the tips received by red caps is somewhat fragmentary but indicates that the tips vary from $1 to $3 or more per day.

178

At about one-half of all stations, and especially at the large ones, the red caps in both classes are required to wear a regulation uniform in addition to a regulation cap and badge, although at a few of them the extent of the uniform is limited to a regulation jacket. In most instances the red caps bear the cost of the uniforms. One company bears the cost when over $20 per person, and at a few

stations the company bears one-half of the cost.
179 The badges, coat buttons, and caps are frequently furnished by and at the expense of the company. The dress requirements and the manner of bearing the cost thereof are, with few exceptions, the same for both classes at each station.

Nearly one-half of those in class A are members of a relief, benefit, or hospital association maintained by the respondents. Those in class B are not usually members of such associations, but there are such members at a few stations. About one-third of the red caps in class A are members of some labor organization having agreements regarding working conditions with respondents. Similar agreements have been made for class B red caps at a few stations, notably for 35 red caps at stations of the Illinois Central Railroad Company in Chicago, Ill., and for 59 red caps of the Southern Pacific Company at Los Angeles, California.

Seniority, when the red cap is otherwise qualified, is usually recognized in the choice of posts, in cases of reduction of force, as to day or night work, and in selection for other forms of promotion. Seniority rights are guaranteed by contract at stations where the red caps are members of a labor organization having an agreement with the railway or station company.

Substantially one-half of the persons in class A are conceded by the reporting companies to be employees, and practically all in class A have been considered as eligible to receive passes for free transportation. Some of the reporting companies concede that those in class B are also employees, but there are only about 200 red
180 caps so conceded. On the other hand, approximately 2,000 of the class B red caps have been

considered by the reporting companies as eligible to receive passes for free transportation.

The following statement represents the position of those companies which do not concede that red caps in class A are employees.

The "Class A" persons are employees only to the extent to which they perform services for these companies and for which services they receive compensation from these companies. Such services do not include services performed for passengers or others in and about stations, as to such services for passengers or others, such "Class A" persons occupy the same status as "Class B" red caps who perform services for passengers or other from whom they receive such compensation as those engaging their services determine. As to those services for passengers or others, these companies are neither obligated to nor do they pay such red caps.

In amplification of the above, respondents explained that the salaries received are for duties such as cleaning stations, operating elevators, calling the trains, or other similar duties. The ultimate conclusion in this proceeding does not depend upon whethen the persons in class A are conceded by respondents to be employees.

Examination of answers to petitions and returns to the questionnaire discloses the position of respondents with respect to red caps who receive no compensation other than tips to be that such persons are not performing a common-carrier service; that they are not hired,
181 but are licensees or concessionaires who are permitted to ply their trade for profit on the station premises; and that they are in the same category as other tradesmen, such as newsboys, bootblacks, barbers, soft-drink servers, taxicab drivers, or transfer agents who

may be permitted by contract to use the station premises for their individual pursuits. It is pointed out that, like red caps, all of these persons must be subject to rules, regulations, and disciplinary supervision in the interests of order, good conduct, and system.

In considering respondents' position as outlined above, it should be noted that the provisions of the Railway Labor Act are not limited to employees performing a common-carrier service. Also, the status of the allegedly comparable tradesman has not been considered by the Commission. However, it seems obvious that most, if not all, of such tradesmen are not so closely related to the transportation service of the respondents, and are allowed more independence of action than are the red caps. For example, a passenger employing the services of a barber expects to, and is expected to, pay a certain fixed charge for the services performed, whereas the remuneration of red caps on a tip basis depends upon the generosity of the passenger.

In their exceptions and oral argument respondents urge that paragraph 5 of section of the Railway Labor Act does not confer upon this Commission any jurisdiction
182 to designate any persons as employees or to designate their work as that of employees, especially where, as here, respondents object to such designation. Paragraph 5 clearly provides that this Commission has the authority to define work performed as that of an employee. If the work performed is that of an employee, those performing the work are necessarily employees.

The Director General of Railroads on March 14, 1919, issued a ruling interpreting his general order 27 and supplement 7 thereto as follows: "The service performed by 'Red Caps' is personal service not a part of the duty

of the carrier, therefore neither General Order No. 27 nor Supplement No. 7 thereto apply to them." General Order 27 was issued during the war period, when the railroads were under Federal control, and its primary purpose was to establish equitable wage scales. Apparently the above-quoted ruling was broad enough to apply to red caps who receive a regular wage as well as those whose only compensation is through tips. On June 15, 1921, the United States Railroad Labor Board, created under the authority of the Transportation Act, 1920, issued a decision denying requests for the establishment of increased rates of pay for "parcel porters generally known as 'Red Caps', and foremen thereof engaged in and around Union Station, Washington, D. C." The decision does not show that the increases in pay were denied because the persons involved were not considered to be employees.

183 On April 18, 1921, the Commission approved rules for reporting information on railroad employees together with a classification and index of steam-railroad occupations which had been prepared by the United States Railroad Labor Board. The Commission issued the following statement in connection with those rules:

The accompanying rules governing the Classification of Steam Railway Employees and Reports of Their Service and Compensation provide for more detailed reports to the Commission relative to railway employees than have hitherto been required. The resulting statistics are intended to meet the needs of both the United States Railroad Labor Board and the Interstate Commerce Commission. The classification of employees was worked out by the Labor Board. The information required concerning each class or so-called reporting division is largely in accord with the recommendation of the Director General of Railroads, with some modifications as the result of con-

ferences and hearings held jointly by the Labor Board and the Commission at which representatives of labor organizations and carriers were present.

The above-mentioned rules provided for the reporting of station attendants described therein as follows:

Station Attendant:

The above class includes positions in which the preponderant duties of incumbents are to be in attendance at stations and to render assistance to the public, 184 such as carrying baggage and parcels, procuring taxicabs and other conveyances, maintaining retiring rooms and lavatories in a clean condition, supplying towels, soap, and other toilet supplies; and to perform related work.

Illustrative Examples of Positions and Duties: Station Attendant: * * * Porter, assisting passengers with baggage and parcels, procuring cabs, etc.

It is obvious that the above definition was intended to apply to red caps, at least to those receiving regular salaries or wages, and the definition is sufficiently broad to cover also red caps whose only compensation is through tips. In 1928 the Commission's Bureau of Statistics informally ruled that the compensation of red caps not on a salary basis need not be included in the carriers' annual reports to the Commission. Although the above-mentioned rulings do not definitely disclose that they were intended as rulings that red caps are not employees, it is deemed appropriate to point out that the information obtained from the returns to the questionnaire in this proceeding is undoubtedly more complete and comprehensive than was the information upon which the aforementioned rulings were based.

The Railroad Retirement Act of 1935, as amended June 24, 1937, specifically provides that persons who receive no compensation other than tips are not subject to that act. The reason for that provision may be that annuities authorized by that act are based largely on percentages of em-
ployees' monthly compensation. The Railway
185 Labor Act is not limited to disputes covering wages or salaries, but also has application to disputes covering working conditions generally. Therefore, the provisions thereof can have application to employees who receive no regular compensation from a carrier. From the fact that persons who receive no compensation other than tips are not excepted, as is the case in the Railroad Retirement Act, it may be presumed that Congress did not intend to so restrict the Railway Labor Act. The National Mediation Board, which administers the Railway Labor Act, has considered the status of red caps at passenger stations in Kansas City, Mo., and Washington, D. C., and in its decisions R-107 of March 23, 1935, and R-171 of November 27, 1935, respectively, has found such persons to be employees under paragraph 5 of section 1 of the Railway Labor Act. As the result of submission to that board of the question of the status of red caps on the Southern Pacific lines and that board's decision R-230, of October 9, 1936, certifying the proper employees' union for purposes of representation, the Southern Pacific has entered into an agreement, heretofore referred to, with the employees' organization, covering red caps at stations on its lines.

When consideration is given to the fact that red caps are used at most of the large passenger stations and that at many stations they are paid regular wages, the con-
clusion is inescapable that at large stations where
186 the distances from trains to waiting rooms and streets are substantial, red caps are considered necessary in the interests of a well-managed station. It

seems to be a proper inference that, where the tips from passengers are not sufficiently remunerative, salaries or wages are paid to such persons. The receipt of a stated wage is not essential to create the relation of master and servant or of employee neither expects nor is entitled to any compensation. The test of such relationship is whether the alleged master or employer has the right to hire or discharge the servant or employee or exercise authority with respect to the manner and conduct of the work to be performed.

The services of red caps are usually engaged in much the same manner as are the services of respondents' employees generally, and red caps are under the general and continuing authority of the stationmaster or similar officer of substantially equal rank and their assistants to supervise and direct the manner of rendition of service. They are also subject to rules with respect to dress and manner of conduct and usually to a variety of other rules, for infractions of which they are subject to reprimand and dismissal. Most companies have considered that they were employees in granting them free transportation. The facts with respect to red caps show that they are employees within the generally accepted meaning of that term.

Although these persons may be employees of the various respondents, it is apparently the latter's position
187 that they are not performing any work which may properly be defined as the work of an employee or subordinate official. We do not agree with that contention, but are of the opinion that the work is of such a nature that it should be included in the Commission's orders defining and classifying employees and subordinate officials. Our findings will be limited to such work performed at cities of over 100,000 population as specified in the questionnaire. However, there is no apparent reason why the work performed at smaller cities should be treated any differently.

The brief of one of the labor organizations cites numerous Court decisions in support of the proposition that red caps are carrier employees. One of the most widely cited decisions is Booker v. Pennsylvania R. Co., 82 Pa. Super. Ct. 588, wherein a passenger sued for the value of a suitcase lost through the negligence of a red cap. The carrier defended on the ground that the red cap was not an employee but plaintiff's personal servant. The Court held for the plaintiff, saying at Page 596:

The baggage at the time it was lost was in the custody or possession of the defendant, in the person of its porter, whom it held out to the traveling public as being employed for the purpose of carrying such baggage.

The Court also said at Page 592:

It was proven that red-cap porters are railroad station porters who assist passengers with their hand baggage; they are bonded and wear a uniform on which
188 there is embroidered "Penna. Station Porter" together with the number assigned them, this one being No. 53; they are under the control of the supervisor of the station to whom they report for instructions and by whom they are assigned to their duties. On some days they run the elevator; again they work in the railroad post office by turns; then again they carry hand baggage for passengers. It was testified by the porter that when they are "portering only" they get no pay from the railroad company but look to the passengers. The jury were not bound to accept this statement as true: * * *; but even if believed that did not of itself change the porter's status from an employee of the railroad company to a servant of the passenger. It was not pretended that the railroad company advertised or informed the traveling public that it had engaged a number of trusted men whom it was prepared to furnish to passengers for employment

by them as personal servants to assist in carrying their hand luggage for reasonable compensation. The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which she was not bound to give and which the porter could not have recovered in an action of assumpsit if the passenger had not seeen fit to give it. The fact that a traveler gives a tip to a porter for courteous service in the carriage of his hand luggage does not make the porter his servant for whose negligence he is responsible any more than a tip given to a bell boy in a hotel, to a waiter in a restaurant, or to a hat check em-

ployee, changes the status of their respective em-
189 ployment. Nor does the fact—if such is the case—
that the railroad company does not pay its employees while they are 'portering only' but that their sole source of revenue in such circumstances is the tips which they receive from passengers, negative the continuance of their employment while acting as porters or relieve the employer of responsibility for their acts within the scope of their employment. If a waiter employed by a hotel or restaurant agrees to work without compensation from his employer, relying on the tips which he anticipates he will receive from the customers, he is none the less in the employ of the hotel or restaurant and does not become the servant for the time being of each, and every customer upon whom he may wait, nor could he sue the customer for compensation upon a quantum meruit if no tip was forthcoming. It is well known that hat check employees are frequently not only paid by the hotel or restaurant where they are employed but that in some instances large sums of money are paid for the concession, but this does not make the hat check employee the servant of the patron who may or may not give him a tip. * * *

Nor is it material that the railroad company has not filed tariffs covering the services of these porters. It

does not file tariffs for their services when they act as elevator men, or for their ushers, or the employees in their bureau of information, or for the many other attendants who furnish aid and assistance to travelers using their line, or are employed in connection with the
190 facilities of transportation which a well managed railroad in large centers of population furnishes to the traveling public to expedite its own business as well as for the convenience and accommodation of its patrons.

Another important case is Franklin v. Southern Pac. Co. 203 Cal. 680, 265 Pac. 936, 59 A. L. R. 118, certiorari denied, 278 U. S. 621 (1928). The plaintiff, a passenger, sued the carrier for negligent loss of hand baggage which she had handed to a red cap at the station, with instructions to redeliver to her on board the train. It appeared that the carrier had filed a tariff with this Commission, reading in part as follows:

Rule 10. Where red-cap porter service is provided, hand baggage will be handled without charge by redcap porters to and from trains of Southern Pacific Company. Liability upon hand baggage handled by redcap porters will be limited to $25.00.

Against the carrier's contention that the red cap was not its employee, the Court said, at Page 683:

The contract to transport respondent admittedly imposed upon appellant the duty of transporting the hand baggage or luggage in question. In considering federal decisions care must be used lest confusion result. The first important consideration at the outset is: Were the services of the porter tendered to and accepted by resondent gratuitous? We think that clearly they were not. Plaintiff paid the full price for her transportation with the knowledge, presumptive or actual, that this service

was part of the consideration entering into the
191 purchase. The fact that it might or could be dispensed with did not make it gratuitous. Porter service of all kinds might be withheld, but the answer to this proposition is that good business principles doubtless require it in order to get and retain patronage. This service must be held to have been covered by the fare paid for the transportation. Herbert v. Shanley Co., 242 U. S. 591.

In an earlier case involving the same carrier, Southern Pac. Co. v. Maloney, 136 Fed. 171, Justice Van Devanter, speaking for the Circuit Court of Appeals, held the carrier liable for damages caused by misdirection and by theft of baggage by a porter in the station.

In the most recent reported case involving the red cap's employment status, Cole v. Atlantic Coast Line R. Co., 211 N. C. 591, 191 S. E. 353, annotated in 22 Minn. L. Rev. 741, a red cap working in defendant's station directed plaintiff to the wrong train and failed to advise her that the train was about to start. As plaintiff started to board the train, it started with a jerk and injured her. The defendant's contentions were substantially the same as respondents' contentions here, that the red caps were not employees. The Court said at Page 355:

It can profit the defendant nothing in the present action that the "red cap" was only a volunteer worker and not upon its payroll * * *. With permission of the de-
fendant he was allowed to work upon the
192 premises, for what he might receive in tips, it is true, nevertheless his acts were those of the defendant in the discharge of the contractual duties which it owed to the railroads, using its station, and to their passengers. * * * He was carrying out his customary duties.

See also Benson v. Northland Transp. Co., 274 N. W. 532 (Minn. 1937); Great Western R. Co. v. Bunch, 13 App.

Cas. 31; and Soanes v. London & S. W. R. Co., 120 Law T. Rep. N. S. 598.

We find that the work defined as that of an employee or subordinate official in the orders of the Commission now in effect should be, and it is hereby, amended and interpreted so as to include the work of persons designated by terms such as red caps, station attendants, parcel porters, ushers, chief ushers, and captains, whose duties consist of or include the carrying of passengers' hand baggage and otherwise assisting passengers at passenger stations and other places on carriers' premises and equipment in cities of over 100,000 population, based on the 1930 census, whether such persons receive a stated compensation or are entirely dependent upon tips, and brings such persons within the term "employee" as used in the fifth paragraph of section 1 of the Railway Labor Act, as amended.

An appropriate order will be entered. 229 I.C.C.

193 ORDER.

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 29th day of September, A. D. 1938.

Ex Parte 72 (Sub-No. 1.)

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials That are to be Included within the Term "Employee" under the Railway Labor Act.

It appearing, That certain employee organizations have filed petitions requesting this Commission to amend or interpret its orders defining and classifying employees and subordinate officials under paragraph 5 of section 1 of the

Railway Labor Act, as amended, so as to include the work of the persons described in the next succeeding paragraph hereof, and full investigation of the matters and things involved having been made, and the division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the work defined as that of an employee or subordinate official in orders of this Commission now in effect be, and it is hereby, amended and interpreted so as to include the work of persons designated by terms such as "red caps", station attendants, station porters, parcel porters, ushers, chief ushers, and captains, whose duties consist of or include the carrying of passengers' hand baggage and otherwise assisting passengers at passenger stations and other places on carriers' premises and equipment, in cities of over 100,000 population, based on the 1930 census, whether such persons receive a stated compensation or are entirely dependent upon tips, and brings the persons performing such work within the term "employee" as used in the fifth paragraph of section 1 of the Railway Labor Act, as amended.

194

By the Commission, division 3.

W. P. BARTEL,
Secretary.

(Seal)

Mr. Flanagan:

Plaintiff next offers in evidence, if your Honor please, PLAINTIFF'S EXHIBIT "Q", which is a Time Table No. 123, published by the defendant company, this particular time table dated July 23, 1939, and I will not read all of it, but I think your Honor will see the meaning of it. It has a list of all trains coming in and out of stations from and to various points, and shows that many of those trains are

going to points beyond the State of Texas and coming from points beyond the State of Texas.

Said time table Exhibit "Q", showing trains arriving in Dallas from other states and leaving Dallas destined to other states.

Mr. Flanagan:

I think that concludes all of the exhibits, if your Honor please, and I would like to call Mr. Estes.

195 D. W. ESTES, being duly sworn, was examined by Mr. Flanagan, and testified as follows:

Q. Your name is D. W. Estes?
A. Yes, sir.
Q. Where do you live?
A. Dallas, Texas.
Q. Are you employed by The Union Terminal Company, the defendant in this case?
A. Yes, sir.
Q. How long have you been employed?
A. Twenty-two years, going on twenty-three.
Q. What are your duties there?
A. I am gateman down there.
Q. By gateman, you mean what?
A. The inspection of tickets and directing people to trains and giving information and answering telephones.
Q. That is tickets of passengers that go to various trains?
A. Yes, sir.
Q. Are you familiar with the trains that run in and out of the station?
A. Yes, sir.
Q. In the inspection of those tickets for the passenge since the 24th day of October, 1938 up to the present tim

have you noted persons, tickets of persons, that
196 were going to points beyond the State of Texas?

A. Yes, sir.

Q. Can you give a fairly accurate estimate of the percentage of people going through the station as to the number going to points beyond the state of Texas?

A. I would say half of them.

Q. Can you tell the Court to what States they were traveling?

A. Oklahoma, Kansas, Arkansas, Illinois, California, Louisiana and various states.

Q. Have you had occasion to observe the incoming trains that come from out of the State of Texas as they stopped there to unload passengers?

A. Yes, sir, I see them coming in every day.

Q. With respect to baggage and passengers traveling on those interstate trains, will you tell the Court how the baggage of the passengers is unloaded, that is, the baggage that accompanies the passengers?

A. I see from my position where I work up there, and out the window, I see them unloaded. The porters unload the baggage from trains, lifting it off and putting it back out of the way so people can get off.

Q. They lift it from the platform of the train?

A. Yes, sir, and put it on the platform of the station.

Q. Do you know upon whose instructions they do that?

A. No, sir, I cannot say that.

197 Q. You do not know?

A. No, sir.

Mr. Flanagan:

That is all, I think.

(Witness excused.)

198 L. H. AKERS, being duly sworn and examined by Mr. Flanagan, testified as follows:

Q. Give your name, please.
A. Louis Haywood Akers.
Q. Address.
A. Route 1, Lancaster, Texas.
Q. Where are you employed?
A. By the Missouri Kansas & Texas Railway Company of Texas.
Q. Are you the L. H. Akers whose name is signed to the working agreement of the Union Terminal Company with the Red Caps?
A. Yes, sir.
Q. As Assistant General Chairman?
A. Yes, sir, I am.
Q. The agreement referred to was dated January 1, 1940?
A. Yes, sir.
Q. Mr. Akers, as the Assistant General Chairman, did you, together with Mr. Foster and Mr. Hyson, and Mr. Barton and Mr. Estes and Mr. Pickett set in various conferences that took place between the company and this committee in the negotiations of the working agreement with these red caps?
A. Yes, sir, I did.
Q. Were you familiar with the letter of protest dated October 24, 1938 forwarded by Mr. Pickett to the Union Terminal Company protesting against the letter dated October 22, 1938 issued to the Red Caps?

199 A. Yes, sir.
Q. I will ask you whether or not this letter of protest dated October 24, 1938 had ever been recalled or revoked by the committee representing these employees?
A. No, sir, it has not to my knowledge.

Q. Were you familiar with the meeting that took place at various times with Mr. Buckner and the officials of the defendant company from October 11, 1938 up to the time of the signing of this agreement dated January 1, 1940?

A. Well, yes, sir, more or less; I was more or less familiar with it.

Q. At any of those conferences was there ever any agreement on the part of the Red Caps, or on the part of the committee representing these men, to withdraw their demand for minimum wage of schedules as referred to in this Rule 16 of the agreement?

A. There was not.

Q. If any of these men have complaints against the company or grievances of any kind, are you one of the men they come to to handle their grievances.

A. They have most always generally reported those grievances directly to me first. In some instances when Mr. Pickett was in town they would report them to him, but they were usually reported to me.

Q. Have you known of any occasion from October 24, 1938 up to the present time where any of these
200 Red Caps had been discharged by reason of their failure to agree to the proposition set out in the letter dated October 22, 1938?

A. No, sir, I do not, I haven't handled a single case regarding that.

Q. Have you handled some of the cases where some of these Red Caps were discharged?

A. I have handled one of those.

Q. That was who?

A. Johnson.

Q. Was he discharged by reason of his failure to agree to this proposition set forth in this letter?

Mr. Payne:

We object to that as calling for a conclusion from the witness.

Mr. Flanagan:
I withdraw that.

Q. Do you know what he was discharged for?

Mr. Payne:
I object to that question as calling for the same conclusion, this witness has no connection with the defendant company:

The Court:
He asked him if he knows, and if he does not know he can say so, why he was discharged.

Mr. Flanagan:
Q. Did you learn from the company why he was discharged?
A. Yes, sir.
Q. What reason did they give you?

201 The Court:
Let him show who he learned it from, you have got an objection here.

Mr. Flanagan:
Q. Who did you learn that from, Mr. Akers?
A. Pardon me—who did I learn it from that he was discharged?
Q. Yes.
A. I learned it from the employee, they served notice on the employee that they were taking him out of the service for the reason—

The Court: (Interrupting):
I sustain the objection now.

Mr. Flanagan:

Q. Did you have any conference with the company about this employee?

A. Yes, sir, I had a conference.

Q. Now, who did you have a conference with?

A. Mr. Buckner.

The Court:

All right.

Mr. Flanagan:

Q. In that conference with Mr. Buckner, did you learn from Mr. Buckner why this man was discharged?

A. Yes, sir.

Q. What was the reason given by him?

A. For certain language or conduct in connection with —a man there that represents the business for the Missouri, Kansas & Texas Railway Company, in connection with the handling with some baggage from the train, they discharged him for the reason that he talked back to this man some way or another.

The Court:

I think that is far enough on that.

Mr. Flanagan:

That is all.

(Witness excused.)

202 JIM FOSTER, (Col.), being duly sworn and examined by Mr. Flanagan on behalf of the plaintiff, testified as follows:

Q. State your name, please.

A. Jim Foster.

Q. Where do you live?
A. 1114 Dale, Oak Cliff, Dallas.
Q. Where are you employed?
A. The Union Terminal Station.
Q. In Dallas, Texas?
A. Yes, sir.
Q. How long have you been employed by that company?
A. Over 15 years.
Q. In what capacity?
A. Captain of the Red Caps at the present time.
Q. How long have you been Captain of the Red Caps?
A. Since May, 1939.
Q. Now, as a Red Cap, you carry baggage to and from the trains down there, do you?
A. I do.
Q. Do all of the Red Caps involved in this suit do the same thing?
A. Yes, sir.
Q. When trains come in from points beyond the State of Texas, outside of the State of Texas, into Dallas, will you tell the Court who unloads the passengers' hand baggage and personal effects out of that train and onto the platform?
203
A. It is our duty to be at those trains when they come in and get the baggage off as quick as possible of the pullman and chair cars to allow passengers to unload.
Q. By whose instructions are you required to take that baggage from the platform of the train and sit it onto the platform of the station?
A. The Station Master.
Q. Who is the Station Master?
A. Mr. W. C. Young.
Q. Did you receive any pay for that?
A. No, sir.
Q. Now, how many hours a day do you work?
A. Eight.

Q. Do all of these men work the same eight hours a day?

A. They work eight hours, but not the same hours.

Q. In other words, they have different shifts?

A. Yes, sir.

Q. You men carry baggage of passengers from trains out to the street, do you?

A. Yes, sir.

Q. And from the street into the trains?

A. Yes, sir.

Q. Do you have occasion to observe where the people are going when you take their baggage into the
204 trains?

A. Going to the trains—

Q. (Interrupting) The people who go to get on the trains?

A. Yes, sir, quite often.

Q. And this baggage check, that was given to you down there, which is marked Exhibit "E", you are familiar with that form of check?

A. Yes, sir, I am.

Q. I note on the back of that it has the number of the porter the car number and section and train number, are you required to do anything with respect to that?

A. Yes, sir, that is instructions as to what space they have, if they have any or reservation if they are going on a pullman, what car they are going in and the number of berth. That is placed on the check.

Q. Who ordered you to fill that information in on that check?

A. It was a custom when I went there and I was instructed by the captain at the time I started to work as to how those things were done.

Q. Since you have been captain down there you have charge of certain of the boys down there, do you?

A. I do, yes, sir.

Q. Certain of the Red Caps?

A. Yes, sir.

Q. Have you been told by anyone connected with the company as to the reason that the information should be placed on there?

205 A. No, sir, we have been called about it, due to mix-ups of baggage, and one time we were called up and cautioned about so much mix-up of baggage and told there would have to be something done about it or else somebody, the man at fault would lose out, and said possibly it was because not taking enough time to find out where the passenger was going, and to take time and ask and see where the passenger was going and avoid it.

Q. Who with the company give you those instructions?

A. Mr. Buckner called us upstairs in his office.

Q. At that time was there any particular thing that happened?

A. Baggage being mixed up was the cause of it, was the cause for so much trouble with it.

Q. Do you sometimes carry the baggage of persons going to and from these various trains that do not pay you for carrying baggage?

A. Yes, sir, that happens.

Q. These people that fail to give you tips for carrying baggage to and from the train, can you tell the Court about what percentage of them that fail to tip you for that?

A. I do not know, I never kept any account of it. It is not something that happens at every train, but it does happen. There are times, I cannot say what per cent though.

Q. Do you have any people who are sick or old people that you carry baggage for that do not pay you?

A. Yes, sir.

206 Q. How often does that happen in the course of a day or week or month?

A. I could not keep any check and I have not kept any check, and I could not say how often it happens.

Q. Would you tell the Court that it happened frequently?

A. Yes, sir, it is a common thing, maybe. I may have it happen to me a time or two a day and hear someone else speaking about it tomorrow.

Q. Have you had any instructions from any officials of the company with respect to whether or not you have to or do not have to carry that baggage?

A. We have instructions and understanding that we are to wait on them whether we get anything, regardless, and we are supposed to wait on them whether they give us anything or not.

Q. In other words, with respect to these tips, do you charge these people anything, or do you depend upon them giving you whatever they want to?

A. They give us whatever they want to.

Q. Are you allowed to make them any special charge or charge them anything, especially any special price?

A. No, sir, we are not.

Q. Your name, I believe appears on this agreement which is marked Plaintiff's Exhibit "A" and dated January 1, 1940, are you the James Foster whose name appears on this agreement as committeeman?

207 A. I am, sir.

Q. Will you tell the Court with respect to the letter of protest that was filed by Mr. Pickett in behalf of your order of Red Caps on October 24, 1938, did your organization ever withdraw that protest?

A. No, sir.

Mr. Payne:

The question involves a conclusion and I object to it. It would be a conclusion as to whether or not the contents of the letter of October 24th was withdrawn, as to whether or not he actually went up and got it from us, maybe that question could be asked, otherwise, I think it is a conclusion of law.

The Court:

The Court bears in mind the position of each side and I will allow him to testify. It might better to shape the question so he would not be testifying to what somebody else said.

Mr. Flanagan:

I will accept the amendment.

Q. Did your committee or your organization at any time ever serve any written notice upon the defendant company that you were withdrawing the protest filed October 24, 1938, in which the protest was made against the action of the company in their letter dated October 22, 1938?

A. No, sir, not that I know of.

Q. And what position do you hold in your union?

A. I am secretary.

Q. And as secretary, have you ever known of
208 any action on the part of your union in withdrawing this protest?

A. No, sir.

Q. Now with respect to tips that were collected by the Red Caps from October 22, 1938 up to the present time, did you ever turn over any of those tips to the company?

A. No, sir.

Q. Did you ever intend to relinquish those tips as your property?

Mr. Payne:

I object to their intention, the intention of this man; our position being that the letter of October 22nd outlines the terms under which they were allowed to retain tips and any secret intention he might have when he acts under our letter of October 22nd, could not affect the binding force of that letter.

Mr. Flanagan:

We contend they never accepted it, it takes two to make an agreement.

The Court:

The question is you have an intention in his heart there, that is the trouble.

Mr. Flanagan:

Maybe I could put it some other way.

The Court:

All right. When you got the tip, you kept it, is that it?

A. Yes, sir.

Mr. Flanagan:

Q. Did you sit in this conference with Mr. Pickett and Mr. Akers and other committeemen from time to time in the working out of this working agreement that
209 was finally signed on January 1, 1940?

A. I did, yes, sir.

Q. I call your attention in that working agreement to Rule No. 16 in which it says:

"The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act', the carrier is required to pay a wage to the Red Cap over and above any amount that may be received by them as tips."

Were you present when that was discussed from time to time about the Fair Labor Standards Act?

A. I was.

Q. Did you at any time ever tell this company that you were accepting the terms of that letter dated October 22, 1938?

A. No, sir, I did not.

Q. Have you ever been paid since October 22, 1938 the rate of pay of 25 cents an hour by the company?

Mr. Payne:

If the Court please, what he received in the way of compensation is set out in the stipulation, and the stipulation also says that no evidence contrary to what is contained in the stipulation can be offered. The question also involves a conclusion as to whether or not the tips he received are a part of the 25 cents, and for that further reason I think it is not a proper question.

210 The Court:

I understood he asked him whether he has been paid the 25 cents regardless of any tips over and above, have you ever been paid 25 cents by the company?

Mr. Payne:

We stipulated that we have not paid them.

Mr. Flanagan:

Just so we have that understanding.

The Court:

I think I understand it. If they did not receive enough in tips to make 25 cents an hour then the company paid them enough to make up that 25 cents for the first year.

Mr. Flanagan:

Yes, sir, that is right.

The Court:

If they received more than 25 cents, this company did not ask them to pay it back?

Mr. Flanagan:

And the same thing is true with reference to 30 cents.

The Court:

Yes.

Mr. Flanagan:

Q. You stated that people for whom baggage was carried going to these various trains in interstate commerce or going to other states, that you knew they were going to other states, how did you know where these people were going?

A. I know by several ways. I have a chance to—in all cases they tell us to put their bag on some certain train and if they have a pullman generally they call the number and they know where that pullman goes, say maybe to Amarillo or to St. Louis or to Houston, where they are going, and they usually say I am going to Muskogee or whatever place they are going, and for that reason I know where they are going. There are particular cases where they do not have a pullman reservation. Of course where they have a pullman reservation I can tell that from the pullman ticket.

211

Q. Could you tell the Court approximately what percentage of the people that you carry baggage for down there taking these trains that are going beyond the state of Texas?

Mr. Payne:

I object to that question because the witness in his previous answer has shown that whatever information he has comes from some third party, the passenger, and would be hearsay so far as the witness is concerned, and if it comes from the ticket it would also be hearsay.

Mr. Flanagan:

I will strike it and ask this:

Q. Based upon the tickets you have examined, based upon pullman tickets that you have examined, can you tell the Court what percentage of the people going into those pullman cars for whom you carry baggage are destined to points beyond the State of Texas?

Mr. Payne:

I object to that question because it calls for a conclusion and hearsay and the tickets themselves would be the best evidence.

The Court:

I do not think you outrage any rule here by even admitting that a great many people go out of the State, go interstate and come back interstate; I overrule the objection and allow him to testify.

Mr. Flanagan:

Q. What would you say?

A. I would say—I have not—I have no way of knowing exactly, but I would say better than half of them.

212 The Court:

You have in your written stipulation that a large business is interstate and a large part of it is intrastate, I do not remember exactly the phrase, but you have that in there, both sides. I do not like to get in the record some little error that might include the real issue. Mr. Estes testified he looked at the tickets and he said about half of them were going interstate, and the objection is made that this man might look at a ticket and could not testify. No objection was made to that before. I do not know how much the Court can judicially know about this, probably nothing, but I travel in and out of that station a great deal, so many years that I would not like to put it in the record. I think there is no question made on the interstate commerce feature of it.

Mr. Flanagan:

Prior to October 22, 1938, before that date, could you tell the Court about how many years you had been working there as a Red Cap?

The Court:

He says fifteen years altogether.

Mr. Flanagan:

Q. During the period before the 22nd day of October, 1938, tell the Court whether or not during that period the Red Caps might retain the tips the public had given to them?

A. If I understand you, you say before—

Q. (Interrupting) Before October 22, 1938?

A. Yes, sir.

Q. Do you use any wheel chairs down there?

A. Yes, sir, we do.

213 Q. Who do they belong to?

A. The Terminal.

Q. What do you use them for?

A. To carry sick or crippled people, passengers to or from the train.

Q. So far as you know, do you know any one of these Red Caps who have been employed there since October 22, 1938 who have ever been discharged because of their protest against the provisions of that letter dated October 22, 1938 when you were required to report your tips?

A. No, sir.

Q. By the way, Mr. Pickett, has he represented your order of Red Caps ever since October 11, 1938?

A. He has, yes, sir.

Q. And this letter of protest, that was written on October 24, 1938, that was written, was it at the request of the Red Caps?

A. It was, yes, sir.

Q. Has he been handling your grievances together with Mr. Akers and Mr. Estes and your committee ever since?

A. Yes, sir.

Q. I mean grievances of the Red Caps, when I say your grievances?

A. Yes, sir.

Mr. Flanagan:

You may take the witness.

214 Cross Examination.

By Mr. Payne:

Q. You kept on working at the Union Terminal after you got this notice dated October 22, 1938 from the Terminal?

A. Yes, sir.

Q. You are still working there now?

A. Yes, sir.

Q. Kept on carrying baggage?

A. Yes, sir.

Q. Kept on receiving tips?

A. I did.

Q. And you keep the tips?

A. Yes, sir.

Q. And you were paid money over and above the tips in some instances, were you, from the Terminal Company?

A. When the tips did not make up, what the tips lacked making up.

Q. And you cashed those checks?

A. Yes, sir.

(Witness excused.)

Mr. Flanagan:

In order to shorten the hearing it has been agreed that the other Red Caps involved in this case would testify substantially as this witness has testified.

If your Honor please, we call the Court's attention to the Second Amended Complaint, Paragraph 5, and
215 the agreed statement of facts, in that we agreed that those figures as set out in there as to hours and statistical information is correct, as set forth in the amended petition, our second amended petition.

Mr. Payne:

I think that is substantially correct.

Mr. Flanagan:

We also have, if your Honor Please, a tabulation, we have made a tabulation rather, and counsel for the defense has a copy which they corrected, which shows the hours worked and the amount received in the form of wages and taxes for each employee, set out under the name of each employee, and by the month, and we want to submit that to your Honor as an exhibit. It compares with this second amended petition in that the totals in the second amended petition are the same as they would be in detailed account. The reason we submit it that way is because there are three periods involved in this case that your Honor may want to examine it.

The Court:

What do you mean by tax?

Mr. Flanagan:

That there were certain amounts set out in the second column in the petition which I think is the social security tax, perhaps counsel for the defendant could give us that information. It was a railroad retirement tax, I understand.

The Court:
That cuts no figure in this case.

Mr. Flanagan:
Except this, if your Honor decides the case in favor of the employees they are entitled to that credit that they paid those taxes in behalf of the employees. For Instance,
Mr. Foster, shows the total amount of wages
216 earned is a certain amount figured on 25 cents an hour, in the first year, and in the second column shows $39.60, and that represents the tax paid in his behalf and also represents this difference between the 25 cents an hour, total of 25 cents an hour and the amount of tips that he collected.

The Court:
He had to pay his taxes, they should come out anyhow?

Mr. Flanagan:
Yes, sir, they are entitled to that credit, and we show a balance due.

The Court:
All right.

Foster, James.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	16.40
Nov.	224	.25	56.00	.....	.....	.....	56.00
Dec.	232	.25	58.00	.....	.....	.....	58.00
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	200	.25	50.00	.....	.....	.....	50.00
Mar.	232	.25	58.00	.....	.....	.....	58.00
Apr.	232	.25	58.00	.....	.....	.....	58.00
May	244	.25	61.00	.....	.....	.....	61.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	246¼	.25	61.56	.....	.....	.....	61.56
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	32	.30	9.60	.....	1.17	1.17	8.43
Nov.	238	.30	71.40	7.52	3.95	11.47	59.93
Dec.	248	.30	74.40	9.10	2.05	11.15	63.25

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	232	.30	69.60	9.64	2.09	11.73	57.87
Feb.	230	.30	69.00	9.33	2.07	11.40	57.60
Mar. 1-6	46	.30	13.80	.....	.....	2.14	11.06
Less 12-39 adj...	2		.60				
	44		13.20				
	3,842¼		1,011.76	$35.59	$11.33	49.06	962.70

Johnson, Isaac.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	231½	.25	57.88	.50	.01	.51	57.37
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00

Feb.	216	.25	54.00	.96	.03	.99	53.01
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	224	.25	56.00	.....	.....	.....	56.00
May	232	.25	58.00	.....	.....	.....	58.00
June	224	.25	56.00	.....	.....	.....	56.00
July	224	.25	56.00	.....	.....	.....	56.00
Aug.	232	.25	58.00	.....	.....	.....	58.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.70	1.74	2.44	16.76
Nov.	216	.30	64.80	5.73	1,78	7.51	57.29
Dec.	240	.30	72.00	6.54	1.98	8.52	63.48
1940.							
Jan.	240	.30	72.00	8.43	2.16	10.59	61.40
Feb.	232	.30	69.60	9.81	2.09	11.90	57.70
Mar. 1-6	48	.30	14.40	.....	.....	3.23	11.17
	3,823½		1,007.88	32.67	9.79	45.69	962.19

Franks, J. C.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	241-2/3	.25	60.42	.....	.....	.....	60.42
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	241½	.25	60.38	$ .02	$ .82	$ .84	59.54
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	1.24	1.24	17.96
Nov.	242-2/3	.30	72.80	5.09	5.17	10.26	62.54
Dec.	248	.30	74.40	5.76	2.05	7.81	66.59

1940.							
Jan.	250¼	.30	75.07	7.03	2.25	9.28	65.79
Feb.	232	.30	69.60	6.75	2.09	8.84	60.76
Mar. 1-6	48	.30	14.40	.....	.....	1.98	12.42
	3,984-1/12		1,050.27	$24.65	$13.62	$40.25	$1,010.02

Brigham, J. W.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	240	.30	72.00	$2.33	$6.78	$9.11	62.89
Dec.	248	.30	74.40	4.01	2.05	6.06	68.34
1940.							
Jan.	248	.30	74.40	9.01	2.23	11.24	63.16
Feb.	232	.30	69.60	3.70	2.09	5.79	63.81
Mar. 1-6	48	.30	14.40	.....	.....	1.63	12.77
	3,960		1,044.00	$19.05	$13.15	33.83	1,010.17

Johnson, A. R.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	227	.25	56.75	.....	.....	.....	56.75

1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	200	.25	50.00	.....	.....	.....	50.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	$1.66	$1.74	$3.40	15.80
Nov.	232	.30	69.60	9.64	1.91	11.55	58.05
Dec.	240	.30	72.00	6.92	1.98	8.90	63.10
1940.							
Jan.	240	.30	72.00	8.31	2.16	10.47	61.53
Feb.	220	.30	66.00	9.16	1.98	11.14	54.86
Mar. 1-6	48	.30	14.40	.....	.....	2.32	12.08
	3,879		1,021.95	35.69	9.77	47.78	974.17

Jefferson, John.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00				$16.00
Nov.	240	.25	60.00				60.00
Dec.	248	.25	62.00				62.00
1939.							
Jan.	248	.25	62.00				62.00
Feb.	224	.25	56.00				56.00
Mar.	248	.25	62.00				62.00
Apr.	208	.25	52.00				52.00
May	240	.25	60.00				60.00
June	240	.25	60.00				60.00
July	248	.25	62.00				62.00
Aug.	248	.25	62.00				62.00
Sept.	240	.25	60.00				60.00
Oct. 1-23	184	.25	46.00				46.00
Oct. 24-31	64	.30	19.20		$2.80	$2.80	16.40
Nov.	240	.30	72.00	$4.41	4.94	9.35	62.65
Dec.	248	.30	74.40	7.27	2.05	9.32	65.08

1940.							
Jan.	248	.30	74.40	8.50	2.23	10.73	63.67
Feb.	232	.30	69.60	8.44	2.09	10.53	59.07
Mar. 1-6	48	.30	14.40	.....	.....	3.04	11.36
	3,960		1,044.00	$28.62	$14.11	$45.77	998.23

Alexander, O. A.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	61	.30	19.20	.....	$4.77	$4.77	14.43
Nov.	242-2/3	.30	72.80	$14.46	5.32	19.78	53.02
Dec.	240	.30	72.00	8.30	1.98	10.28	61.72
1940.							
Jan.	184	.30	55.20	7.19	1.66	8.85	40.35
Feb.	232½	.30	69.75	4.84	2.09	6.93	62.82
Mar. 1-6	40	.30	12.00	.....	.....	1.39	10.61
	3,915-1/6		1,028.95	3479	15.82	52.00	976.95

Jackson, Joe.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	$ .68	$ .02	$ .70	55.30
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	240	.25	60.00	.....	.....	.....	60.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	1.74	1.74	17.46
Nov.	244-1/6	.30	73.25	11.29	5.50	16.79	56.46
Dec.	200	.30	60.00	5.85	1.65	7.50	52.50
1940.							
Jan.	248	.30	74.40	10.29	2.23	12.52	61.88
Feb.	232	.30	69.60	9.18	2.09	11.27	58.33
Mar. 1-6	48	.30	14.40	.....	.....	2.00	12.40
	3,948-1/6		1,038.85	27.29	13.23	52.52	986.33

McIntosh, Nathan.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	$ .68	$ .02	$ .70	$13.30
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	2.27	2.27	14.53
Nov.	240	.30	72.00	5.75	6.92	12.67	59.33
Dec.	248	.30	74.40	8.33	2.05	10.38	64.02

1940.							
Jan.	184	.30	55.20	9.48	1.66	11.14	44.06
Feb.	136	.30	40.80	8.10	1.22	9.32	31.48
Mar. 1-6	48	.30	14.40	.....	.....	3.03	11.37
	3,824		1,001.60	$32.34	$14.14	$49.51	$952.09

Turner, Nelson.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	$ .07	.....	.07	$15.93
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	240	.25	60.00	.....	.....	.....	60.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$4.80	$4.80	14.40
Nov.	232	.30	69.60	10.43	5.30	15.73	53.87
Dec.	232	.30	69.60	6.19	1.91	8.10	61.50
1940.							
Jan.	232	.30	69.60	11.50	2.09	13.59	56.01
Feb.	220	.30	66.00	8.60	1.98	10.58	55.42
Mar. 1-6	40	.30	12.00	.....	.....	2.65	9.35
	3,916		1,030.00	36.79	16.08	55.52	974.48

Brooks, Lem.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	232	.25	58.00	.....	.....	.....	58.00

1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	208	.25	52.00	$ .04	.....	$ .04	51.96
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	240	.25	60.00	.....	.....	.....	60.00
June	240	.25	60.00	.....	.....	.....	60.00
July	216	.25	54.00	.....	.....	.....	54.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$2.83	2.83	16.37
Nov.	224	.30	67.20	6.83	4.99	11.82	55.38
Dec.	248	.30	74.40	8.71	2.03	10.76	63.64
1940.							
Jan.	224	.30	67.20	9.72	2.02	11.74	55.46
Feb.	232	.30	69.60	8.20	2.09	10.29	59.31
Mar. 1-6	48	.30	14.40	.....	.....	2.15	12.25
	3,872		1,020.00	33.50	13.98	49.63	970.37

Thomas, Allen.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00				$14.00
Nov.	240	.25	60.00				60.00
Dec.	248	.25	62.00				62.00
1939.							
Jan.	232	.25	58.00				58.00
Feb.	168	.25	42.00				42.00
Mar.	248	.25	62.00				62.00
Apr.	232	.25	58.00				58.00
May	228	.25	57.00				57.00
June	224	.25	56.00				56.00
July	240	.25	60.00				60.00
Aug.	248	.25	62.00				62.00
Sept.	240	.25	60.00				60.00
Oct. 1-23	180	.25	45.00				45.00
Oct. 24-31	64	.30	19.20				19.20
Nov.	240	.30	72.00		$5.80	$5.80	66.20
Dec.	232	.30	69.60	$10.71	3.54	14.25	55.35

1940.							
Jan.	232	.30	69.60	9.49	2.09	11.58	58.02
Feb.	216	.30	64.80	8.51	1.94	10.45	54.35
Mar. 1-6	40	.30	12.00	.....	.....	2.20	9.80
	3808		1,003.20	28.71	13.37	44.28	958.92

Williams, Richard.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	182	.25	45.50	.....	.....	.....	45.50
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	240	.30	72.00	.....	$5.93	$5.93	66.07
Dec.	248	.30	74.40	$6.82	2.10	8.92	65.48
1940.							
Jan.	240	.30	72.00	4.56	2.16	6.72	65.28
Feb.	232	.30	69.60	5.39	2.09	7.48	62.12
Mar. 1-6	48	.30	14.40	.....	.....	1.85	12.55
	3,982		1,049.10	$16.77	$12.28	$30.90	1,018.20

Hollingsworth, Ulyssus.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	144	.25	36.00	.....	.....	.....	36.00
Dec.	176	.25	44.00	.....	.....	.....	44.00

1939.							
Jan.	240	.25	60.00	....	....	....	60.00
Feb.	176	.25	44.00	....	....	....	44.00
Mar.	240	.25	60.00	....	....	....	60.00
Apr.	233½	.25	58.38	....	....	....	58.38
May	248	.25	62.00	....	....	....	62.00
June	240	.25	60.00	....	....	....	60.00
July	256	.25	64.00	....	....	....	64.00
Aug.	244	.25	61.00	....	....	....	61.00
Sept.	232	.25	58.00	....	....	....	58.00
Oct. 1-23	176	.25	44.00	....	....	....	44.00
Oct. 24-31	64	.30	19.20	....	.02	.02	19.18
Nov.	232	.30	69.60	$ 9.07	$7.28	$16.35	53.25
Dec.	248	.30	74.40	12.69	2.05	14.74	59.66
1940.							
Jan.	232	.30	69.60	12.31	2.09	14.40	55.20
Feb.	216	.30	64.80	9.01	1.94	10.95	53.85
Mar. 1-6	48	.30	14.40	....	....	2.95	11.45
	3,701½		977.38	$43.08	$13.38	$59.41	917.97

Turpin, J. T.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	24	.25	$6.00				$6.00
Nov.	24	.25	6.00				6.00
Dec.	96	.25	24.00				24.00
1939.							
Jan.	104	.25	26.00				26.00
Feb.	120	.25	30.00				30.00
Mar.	248	.25	62.00				62.00
Apr.	228	.25	57.00				57.00
May	244	.25	61.00				61.00
June	240	.25	60.00				60.00
July	248	.25	62.00				62.00
Aug.	248	.25	62.00				62.00
Sept.	240	.25	60.00				60.00
Oct. 1-23	176	.25	44.00				44.00
Oct. 24-31	64	.30	19.20				19.20
Nov.	240	.30	72.00	$6.13	$5.72	$11.85	60.15
Dec.	224	.30	67.20	5.16	1.64	6.80	60.40

1940.							
Jan.	240	.30	72.00	5.73	2.32	8.10	63.90
Feb.	224	.30	67.20	8.23	2.02	10.25	56.95
Mar. 1-6	48	.30	14.40	.....	.....	2.50	11.90
	3,280		$872.00	$25.25	$11.75	$39.50	832.50

Campbell, Dave.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	24	$ .25	$6.00	.....	.....	.....	$ 6.00
Nov.	236	.25	59.00	.....	.....	.....	59.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	216	.25	54.00	.....	.....	.....	54.00
Feb.	176	.25	44.00	.....	.....	.....	44.00
Mar.	212	.25	53.00	.....	.....	.....	53.00
Apr.	224	.25	56.00	.....	.....	.....	56.00
May	228	.25	57.00	.....	.....	.....	57.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	152	.25	38.00	.....	.....	.....	38.00
Aug.	216	.25	54.00	.....	.....	.....	54.00
Sept.	224	.25	56.00	.....	.....	.....	56.00
Oct. 1-23	168	.25	42.00	.....	.....	.....	42.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	214	.30	64.20	$1.95	$4.97	$6.92	57.28
Dec.	214	.30	64.20	9.78	1.77	11.55	52.65
1940.							
Jan.	176	.30	52.80	9.10	1.58	10.68	42.12
Feb.	184	.30	55.20	8.27	1.66	9.93	45.27
Mar. 1-6	32	.30	9.60	.....	.....	1.10	7.90
Less 12-39 adj.	2		.60				
	30		9.00				
	3,438		903.60	29.10	9.98	40.18	863.42

Fields, Nelson.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	44	$ .25	$11.00	.....	.....	.....	$11.00
Nov.	64	.25	16.00	.....	.....	.....	16.00
Dec.	176	.25	44.00	.....	.....	.....	44.00
1939.							
Jan.	200	.25	50.00	.....	.....	.....	50.00
Feb.	184	.25	46.00	.....	.....	.....	46.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	.45	.45	16.35
Nov.	240	.30	72.00	$5.98	$6.18	$12.16	59.84
Dec.	248	.30	74.40	9.07	2.05	11.12	63.28

237

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	248	.30	74.40	10.77	2.23	13.00	61.40
Feb.	232	.30	69.60	8.47	2.09	10.56	59.04
Mar. 1-6	48	.30	14.40	.....	.....	2.60	11.80
	3.628		$960.60	$34.29	$13.00	$49.89	$910.71

Robertson, C. H.

238

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	40	$ .25	$10.00	.....	.....	.....	$10.00
Nov.	200	.25	50.00	.....	.....	.....	50.00
Dec.	206	.25	51.50	.....	.....	.....	51.50
1939.							
Jan.	248	.25	62.00	$ .63	$ .02	$ .65	61.35
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	176	.25	44.00	.....	.....	.....	44.00
Apr.	241½	.25	60.38	.....	.....	.....	60.38

May	216	.25	54.00	.....	.....	.....	54.00
June	212	.25	53.00	.....	.....	.....	53.00
July	96	.25	24.00	.....	.....	.....	24.00
Aug.	80	.25	20.00	.....	.....	.....	20.00
Sept.	136	.25	34.00	.....	.....	.....	34.00
Oct. 1-23	160	.25	40.00	.....	.....	.....	40.00
Oct. 24-31	64	.30	19.20	.....	.26	.26	18.94
Nov.	238	.30	71.40	11.22	7.50	18.72	52.68
Dec.	136	.30	40.80	7.70	1.12	8.82	31.98
1940.							
Jan.	160	.30	48.00	7.69	1.44	9.13	38.87
Feb.	120	.30	36.00	5.10	1.08	6.18	29.82
Mar 1-6	40	.30	12.00	.....	.....	2.39	9.61
	2,985½		784.28	32.34	11.42	46.15	738.13

Hunt, Haywood.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	246½	.25	61.63	.....	.....	.....	61.63

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	241½	.25	60.38	.....	.....	.....	60.38
May	208	.25	52.00	.....	.....	.....	52.00
June	232	.25	58.00	.....	.....	.....	58.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$1.57	$1.57	17.63
Nov.	240	.30	72.00	$ 3.94	7.64	11.58	60.42
Dec.	248	.30	74.40	12.84	2.05	14.89	59.51
1940.							
Jan.	248	.30	74.40	13.50	2.23	15.73	58.67
Feb.	232	.30	69.60	11.98	2.09	14.07	55.53
Mar. 1-6	48	.30	14.40	.....	.....	2.60	11.80
	3,952		1,042.01	$42.26	$15.58	$60.44	$981.57

240

Spears, Donald.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	216	.25	54.00	.....	.....	.....	54.00
Dec.	249-2/3	.25	62.42	.....	.....	.....	62.42
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	240	.30	72.00	.....	$7.40	$7.40	64.60
Dec.	248	.30	74.40	$8.06	3.52	11.58	62.82

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	248	.30	74.40	11.29	2.23	13.52	60.88
Feb.	224	.30	67.20	8.52	2.02	10.54	56.66
Mar. 1-6	48	.30	14.40	.....	.....	2.04	12.36
	3,945-2/3		1,040.02	$27.87	$15.17	$45.08	$994.94

Hynson, Clinton.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	184	.25	46.00	.....	.....	.....	46.00
Mar.	152	.25	38.00	.....	.....	.....	38.00
Apr.	224	.25	56.00	.....	.....	.....	56.00

May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	232	.25	58.00	.....	.....	.....	58.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	$ .91	$ .91	$1.82	17.38
Nov.	224	.30	67.20	3.70	1.85	5.55	61.65
Dec.	248	.30	74.40	2.83	.99	3.82	70.58
1940.							
Jan.	248	.30	74.40	4.36	3.29	7.65	66.75
Feb.	228	.30	68.40	6.23	2.05	8.28	60.12
Mar. 1-6	48	.30	14.40	.....	.....	2.20	12.20
	3,788		1,000.00	$18.03	$9.09	$29.32	$970.68

Curry, J. P.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	192	.25	48.00	.....	.....	.....	48.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	$3.04	$3.04	13.76
Nov.	240	.30	72.00	$6.67	5.16	11.83	60.17
Dec.	240	.30	72.00	8.05	1.98	10.03	61.97
1940.							
Jan.	248	.30	74.40	5.77	2.23	8.00	66.40
Feb.	232	.30	69.60	10.44	2.09	12.53	57.07
Mar. 1-6	48	.30	14.40	.....	.....	3.25	11.15
	3,920		1,033.20	$30.93	$14.50	$48.68	$984.52

Langston, Charlie.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	232	.25	58.00	$ .83	$ .02	$ .85	57.15
1939.							
Jan.	232	.25	58.00	3.69	.10	3.79	54.21
Feb.	216	.25	54.00	6.38	.18	6.56	47.44
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	240	.25	60.00	.....	.....	.....	60.00
June	224	.25	56.00	.....	.....	.....	56.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	168	.25	42.00	.....	.....	.....	42.00
Sept.	168	.25	42.00	.....	.....	.....	42.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	1.49	5.69	7.18	12.02
Nov.	241	.30	72.30	17.53	1.99	19.52	52.78
Dec.	248	.30	74.40	11.97	2.05	14.02	60.38

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	240	.30	72.00	12.05	2.16	14.21	57.79
Feb.	224	.30	67.20	11.78	2.02	13.80	53.40
Mar. 1-6	48	.30	14.40	.....	.....	3.85	10.55
	3,761		993.50	65.72	14.21	83.78	909.72

Muckelroy, Charles.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	$8.99	$ .25	$9.24	50.76
Dec.	248	.25	62.00	6.13	.17	6.30	55.70
1939.							
Jan.	248	.25	62.00	6.40	.18	6.58	55.42
Feb.	224	.25	56.00	5.72	.16	5.88	50.12
Mar.	248	.25	62.00	6.69	1.71	8.40	53.60
Apr.	240	.25	60.00	8.15	1.65	9.80	50.20

May	248	.25	62.00	3.82	1.71	5.53	56.47
June	240	.25	60.00	10.39	1.65	12.04	47.96
July	248	.25	62.00	7.60	1.71	9.31	52.69
Aug.	240	.25	60.00	8.71	1.65	10.36	49.64
Sept.	240	.25	60.00	5.35	1.65	7.00	53.00
Oct. 1-23	152	.25	38.00	.....	.....	.....	38.00
Oct. 24-31	32	.30	9.60	4.36	1.31	5.67	3.93
Nov.	240	.30	72.00	2.36	1.98	4.34	67.66
Dec.	248	.30	74.40	4.97	2.05	7.02	67.38
1940.							
Jan.	248	.30	74.40	4.02	2.23	6.25	68.15
Feb.	232	.30	69.60	5.91	2.09	8.00	61.60
Mar. 1-6	48	.30	14.40	.....	.....	2.56	11.84
	3,928		1,034.40	$99.57	$22.15	$124.28	$910.12

Jackson, Felix.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	$ .68	$ .02	$ .70	55.30
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	232	.25	58.00	.....	.....	.....	58.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	3.52	3.52	15.68
Nov.	240	.30	72.00	12.20	3.95	16.15	55.85
Dec.	248	.30	74.40	10.12	2.05	12.17	62.23
1940.							
Jan.	248	.30	74.40	10.03	2.23	12.26	62.14
Feb.	232	.30	69.60	9.18	2.09	11.27	58.33
Mar. 1-6	48	.30	14.40	.....	.....	2.56	11.84
	3,984		1,050.00	42.21	$13.86	$58.63	$991.37

248

Brigham, Paul.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	224	.25	56.00	.....	.....	.....	56.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	200	.25	50.00	.....	.....	.....	50.00
Mar.	232	.25	58.00	.....	.....	.....	58.00
Apr.	233½	.25	58.38	.....	.....	.....	58.38
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	216	.25	54.00	.....	.....	.....	54.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.82	.82	18.38
Nov.	240	.30	72.00	$2.01	$5.97	$7.98	64.02
Dec.	248	.30	74.40	6.42	2.05	8.47	65.93

Month 1940.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	248	.30	74.40	7.06	2.23	9.29	65.11
Feb.	136	.30	40.80	4.18	1.22	5.40	35.40
Mar 1-6	48	.30	14.40	.....	.....	2.65	11.75
	3,785½		995.58	$19.67	$12.29	$34.61	960.97

May, Arthur.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	$ .25	$ .01	$ .26	$15.74
Nov.	232	.25	58.00	.80	.02	.82	57.18
Dec.	225-2/3	.25	56.42	.63	.02	.65	55.77
1939.							
Jan.	248	.25	62.00	.29	.01	.30	61.70
Feb.	224	.25	56.00	1.07	.03	1.10	54.90
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00

July	248	.25	62.00	.....	.....	.....	62.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	5.97	5.97	13.23
Nov.	241½	.30	72.45	16.04	3.61	19.65	52.80
Dec.	216	.30	64.80	11.04	1.78	12.82	51.98
1940.							
Jan.	248	.30	74.40	12.02	2.23	14.25	60.15
Feb.	232½	.30	69.75	9.20	2.09	11.29	58.46
Mar. 1-6	48	.30	14.40	.....	.....	3.31	11.09
	3,915-2/3		1,031.42	51.34	15.77	70.42	961.00

Jones, Theodore.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	32	$ .25	$8.00	.....	.....	.....	$8.00
Nov.	8	.25	2.00	.....	.....	.....	2.00
Dec.	104	.25	26.00	.....	.....	.....	26.00
1939.							
Jan.	72	.25	18.00	.....	.....	.....	18.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Feb.	120	.25	30.00	.....	.....	.....	30.00
Mar.	160	.25	40.00	.....	.....	.....	40.00
April	216	.25	54.00	.....	.....	.....	54.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	176	.25	44.00	.....	.....	.....	44.00
Oct. 1-23	80	.25	20.00	.....	.....	.....	20.00
Oct. 24-31	40	.30	12.00	.....	.....	.....	12.00
Nov.	80	.30	24.00	$3.12	$1.43	$4.55	19.45
Dec.	184	.30	55.20	4.01	1.52	5.53	49.67
1940.							
Jan.	192	.30	57.60	6.34	1.73	8.07	49.53
Feb.	200	.30	60.00	5.02	1.80	6.82	53.18
Mar. 1-6	40	.30	12.00	.....	.....	1.53	9.87
Less 12/39 adj.	2		.60				
	38		11.40				
	2,670		704.20	$18.49	$6.48	$26.50	677.70

252

Cameron, Tilson.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	200	.25	50.00	.....	.....	.....	50.00
Apr.	208	.25	52.00	.....	$ .28	$ .28	51.72
May	...	...	.....	.....	.....	.....	.....
June	...	...	.....	.....	.....	.....	.....
July	160	.25	40.00	.....	.....	.....	40.00
Aug.	216	.25	54.00	.....	.....	.....	54.00
Sept.	208	.25	52.00	.....	.....	.....	52.00
Oct. 1-23	160	.25	40.00	.....	.....	.....	40.00
Oct. 24-31	56	.30	16.80	.....	1.40	1.40	15.40
Nov.	208	.30	62.40	$3.38	6.60	9.98	52.42
Dec.	203	.30	60.90	6.33	1.67	8.00	52.90

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	216	.30	64.80	9.24	1.94	11.18	53.62
Feb.	200	.30	60.00	7.91	1.80	9.71	50.29
Mar. 1-6	40	.30	12.00	.....	.....	2.45	9.55
	3,083		816.90	26.86	13.69	43.00	773.90

McMurray, William.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	168	.25	42.00	.....	.....	.....	42.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	240	.25	60.00	.....	.....	.....	60.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00

June		224	.25		56.00				56.00
July		184	.25		46.00				46.00
Aug.		248	.25		62.00				62.00
Sept.		240	.25		60.00				60.00
Oct. 1-23		184	.25		46.00				46.00
Oct. 24-31		64	.30		19.20		$3.50	$3.50	15.70
Nov.		240	.30		72.00	$9.12	7.97	17.09	54.91
Dec.		248	.30		74.40	13.37	2.05	15.42	58.98
1940.									
Jan.		232	.30		69.60	10.91	2.09	13.00	56.60
Feb.		232	.30		69.60	10.81	2.09	12.90	56.70
Mar. 1/6	48			14.40					
Less 12/39 adj.	2	46	.30	.60	13.80			2.40	11.40
		3,814			1,006.60	44.21	17.70	64.31	942.29

255

Williams, Sam H.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct.	24	$ .25	$6.00				$6.00
Nov.	24	.25	6.00				6.00
Dec.	72	.25	18.00				18.00

Month 1939.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	48	.25	12.00	.....	.....	.....	12.00
Feb.	16	.25	4.00	.....	.....	.....	4.00
Mar.	16	.25	4.00	.....	.....	.....	4.00
Apr.	24	.25	6.00	.....	.....	.....	6.00
May	64	.25	16.00	.....	.....	.....	16.00
June	32	.25	8.00	.....	.....	.....	8.00
July	56	.25	14.00	.....	.....	.....	14.00
Aug.	56	.25	14.00	.....	.....	.....	14.00
Sept.	32	.25	8.00	.....	.....	.....	8.00
Oct. 1-23	8	.25	2.00	.....	.....	.....	2.00
Oct. 24-31	8	.30	2.40	.....	.....	.....	2.40
Nov.	8	.30	2.40	....	$1.10	$1.10	1.30
Dec.	40	.30	12.00	$1.87	1.03	2.90	9.10
1940.							
Jan.	26-2/3	.30	8.00	2.37	.24	2.61	5.39
Feb.	56½	.30	16.95	2.54	.51	3.05	13.90
Mar. 1-6	8	.30	2.40	.....	.....	.55	1.85
	619-1/6		$162.15	$6.78	$2.88	$10.21	$151.94

256

Amos, Earnest.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	$ 9.94	$ .28	$10.22	47.78
Dec.	240	.25	60.00	14.57	.41	14.98	45.02
1939.							
Jan.	240	.25	60.00	12.32	.35	12.67	47.33
Feb.	216	.25	54.00	8.65	.24	8.89	45.11
Mar.	248	.25	62.00	13.55	1.71	15.26	46.74
Apr.	224	.25	56.00	10.36	1.54	11.90	44.10
May	244	.25	61.00	10.08	1.68	11.76	49.24
June	240	.25	60.00	10.88	1.65	12.53	47.47
July	240	.25	60.00	13.82	1.65	15.47	44.53
Aug.	248	.25	62.00	18.03	1.71	19.74	42.26
Sept.	240	.25	60.00	20.33	1.65	21.98	38.02
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	15.66	2.89	18.55	.65
Nov.	240	.30	72.00	13.84	1.98	15.82	56.18
Dec.	246	.30	73.80	13.16	2.03	15.19	58.61

Month 1940.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	248	.30	74.40	12.53	2.23	14.76	59.60
Feb.	224	.30	67.20	11.73	2.02	13.75	53.45
Mar 1-6	48		14.40				
Less 12/39 adj.	5	43	30 1.50	12.90	.....	.....	3.00	9.81
	3,925		1,034.50	$209.45	$24.02	$236.56	$797.94

Harton, Harry.

258

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	240	.25	60.00	.....	.....	.....	60.00
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	168	.25	42.00	.....	.....	.....	42.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00

May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	246½	.25	61.63	.....	.....	.....	61.63
Aug.	200	.25	50.00	.....	.....	.....	50.00
Sept.	136	.25	34.00	.....	.....	.....	34.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$1.34	$1.34	17.86
Nov.	240	.30	72.00	$4.22	7.46	11.68	60.32
Dec.	248	.30	74.40	5.27	1.51	6.78	67.62
1940.							
Jan.	248	.30	74.40	7.92	2.77	10.69	63.71
Feb.	232	.30	69.60	7.31	2.09	9.40	60.20
Mar. 1-6	48	.30	14.40	.....	.....	1.86	12.54
	3,774½		997.63	$24.72	$15.17	$41.75	$955.88

Wells, Adolphus.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	16	$ .25	$4.00	.....	.....	.....	$ 4.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	180	.25	45.00	.....	.....	.....	45.00

Month 1939.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	136	.25	34.00	.....	.....	.....	34.00
Mar.	...	...	.....	.....	.....	.....	.....
Apr.	56	.25	14.00	.....	.....	.....	14.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	224	.25	56.00	.....	.....	.....	56.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	144	.25	36.00	.....	.....	.....	36.00
Oct. 24-31	64	.30	19.20	$ .62	$5.03	$ 5.65	13.55
Nov.	240	.30	72.00	12.29	1.98	14.27	57.73
Dec.	224	.30	67.20	8.68	1.85	10.53	56.67
1940.							
Jan.	248	.30	74.40	11.07	2.23	13.30	61.10
Feb.	232	.30	69.60	10.28	2.09	12.37	57.23
Mar. 1-6	48	.30	14.40	.....	....	2.24	12.16
	3,260		$867.80	$42.94	$13.18	58.36	809.44

260

Connor Alphonso.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	40	.25	$10.00	.....	.....	.....	$10.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	232	.25	58.00	.....	.....	.....	58.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00
July	228	.25	57.00	.....	.....	.....	57.00
Aug.	88	.25	22.00	.....	.....	.....	22.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	$1.39	$1.39	15.41
Nov.	240	.30	72.00	$ 6.52	7.22	13.74	58.26
Dec.	248	.30	74.40	11.75	2.05	13.80	60.60

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	240	.30	72.00	7.29	2.16	9.45	62.55
Feb.	224	.30	67.20	7.53	2.02	9.55	57.65
Mar. 1-6	48	.30	14.40	.....	.....	2.10	12.30
	3,732		985.80	33.09	14.84	50.03	935.77

McNeil, Lawrence.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	208	.25	52.00	$3.68	$ .10	$3.78	48.22
1939.							
Jan.	248	.25	62.00	5.58	.16	5.74	56.26
Feb.	200	.25	50.00	3.88	.11	3.99	46.01
Mar.	240	.25	60.00	1.50	1.65	3.15	56.85
Apr.	228	.25	57.00	2.56	1.57	4.13	52.87

May	240	.25	60.00	2.27	1.65	3.92	56.08
June	240	.25	60.00	7.45	1.65	9.10	50.90
July	248	.25	62.00	6.34	1.71	8.05	53.95
Aug.	248	.25	62.00	6.83	1.71	8.54	53.46
Sept.	240	.25	60.00	4.93	1.65	6.58	53.42
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	2.39	3.28	5.82	13.53
Nov.	233	.30	69.90	10.22	3.92	14.14	55.76
Dec.	232	.30	69.60	7.98	1.91	9.89	59.71
1940.							
Jan.	240	.30	72.00	13.29	2.16	15.45	56.55
Feb.	200	.30	60.00	8.77	1.80	10.57	49.43
Mar. 1-6	32	.30	9.60	.....	.....	2.10	7.50
	3,829		1,007.30	$87.67	$25.03	$114.80	$892.50

Busby, Cornelius.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	...	...	.....	.....	.....	.....	.....
Nov.	...	...	.....	.....	.....	.....	.....
Dec.	...	...	.....	.....	.....	.....	.....

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	56	$ .25	$14.00	.....	.....	.....	$14.00
Feb.	176	.25	44.00	.....	.....	.....	44.00
Mar.	72	.25	18.00	.....	.....	.....	18.00
Apr.	32	.25	8.00	.....	.....	.....	8.00
May	96	.25	24.00	.....	.....	.....	24.00
June	56	.25	14.00	.....	.....	.....	14.00
July	40	.25	10.00	.....	.....	.....	10.00
Aug.	152	.25	38.00	.....	.....	.....	38.00
Sept.	128	.25	32.00	.....	.....	.....	32.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	241½	.30	72.45	$3.37	$5.65	$ 9.02	63.43
Dec.	240	.30	72.00	8.83	1.98	10.81	61.19
1940.							
Jan.	242¼	.30	72.68	9.59	2.18	11.77	60.91
Feb.	224	.30	67.20	10.74	2.02	12.76	54.44
Mar. 1-6	48	.30	14.40	.....	.....	3.55	10.85
	2,051¾		$565.93	$32.53	$11.83	$47.91	$518.02

264

Jackson, Columbus;

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31.....	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	232	.25	58.00	.....	.....	.....	58.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	232	.25	58.00	.....	.....	.....	58.00
May	244	.25	61.00	.....	.....	.....	61.00
June	228	.25	57.00	.....	.....	.....	57.00
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$3.61	$3.61	15.59
Nov.	240	.30	72.00	$8.76	4.59	13.35	58.65
Dec.	248	.30	74.40	8.54	2.05	10.59	63.81

Month 1940.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	248	.30	74.40	9.82	2.23	12.05	62.35
Feb.	232	.30	69.60	10.31	2.09	12.40	57.20
Mar. 1-6	48	.30	14.40	.....	.....	1.61	12.79
	3,952		1,042.00	$37.43	$14.57	$53.61	$988.39

Campbell, Scott.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	48	$ .25	$12.00	$2.92	$ .08	$3.00	$9.00

Barton, H. N.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	32	$ .25	$ 8.00	.....	.....	.....	$ 8.00
Nov.	216	.25	54.00	.....	.....	.....	54.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

1939.							
Jan.	224	.25	56.00	.....	.....	.....	56.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	240	.25	60.00	.....	.....	.....	60.00
Apr.	241½	.25	60.38	.....	.....	.....	60.38
May	216	.25	54.00	.....	.....	.....	54.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	200	.25	50.00	.....	.....	.....	50.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.....	.12	.12	19.08
Nov.	240	.30	72.00	$1.39	$9.18	$10.57	61.43
Dec.	232	.30	69.60	9.93	1.91	11.84	57.76
1940.							
Jan.	248	.30	74.40	7.68	2.23	9.91	64.49
Feb.	232	.30	69.60	5.50	2.09	7.59	62.01
Mar. 1-6	48	.30	14.40	.....	.....	2.00	12.40
	3,817½		1,007.58	$24.50	$15.53	$42.03	$965.55

Kelton, Silas.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	...	...	.....	.....	.....	.....	.....
Nov.	...	...	.....	.....	.....	.....	.....
Dec.	56	$ .25	$14.00	.....	.....	.....	$14.00
1939.							
Jan.	40	.25	10.00	.....	.....	.....	10.00
Feb.	24	.25	6.00	.....	.....	.....	6.00
Mar.	8	.25	2.00	.....	.....	.....	2.00
Apr.	42½	.25	10.63	.....	.....	.....	10.63
May	85½	.25	21.38	.....	.....	.....	21.38
June	72	.25	18.00	.....	.....	.....	18.00
July	80	.25	20.00	.....	.....	.....	20.00
Aug.	56	.25	14.00	.....	.....	.....	14.00
Sept.	88	.25	22.00	.....	.....	.....	22.00
Oct. 1-23	32	.25	8.00	.....	.....	.....	8.00
Oct. 24-31	8	.30	2.40	.....	$ .63	$ .63	1.77
Nov.	43 2/3	.30	13.10	2.12	1.03	3.15	9.95
Dec.	56	.30	16.80	3.54	.46	4.00	12.80

1940.							
Jan.	82-2/3	.30	24.80	4.90	.74	5.64	19.16
Feb.	24	.30	7.20	2.17	.22	2.39	4.81
Mar. 1-6	8	.30	2.40	.....	.....	.55	1.85
	806-1/3		$212.71	$12.73	$3.08	$16.36	$196.35

Ellston, Russell.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	$ .88	$ .03	$ .91	$15.09
Nov.	240	.25	60.00	1.71	.05	1.76	58.24.
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	232	.25	58.00	.....	.....	.....	58.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.96	.96	18.24
Nov.	241½	.30	72.45	.....	7.24	7.24	65.21
Dec.	248	.30	74.40	2.98	2.88	5.86	68.54
1940.							
Jan.	248	.30	74.40	7.08	2.65	9.73	64.67
Feb.	232	.30	69.60	9.15	2.09	11.24	58.36
Mar. 1-6	48	.30	14.40	.....	.....	2.36	12.04
	3,977½		1,048.45	$21.80	$15.90	$40.06	1,008.39

Bailey, Frank.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	8	$ .25	$2.00	.....	.....	.....	$2.00
Nov.	...	...	.....	.....	.....	.....	.....
Dec.	64	.25	16.00	.....	.....	.....	16.00

1939.							
Jan.	40	.25	10.00	.....	.....	.....	10.00
Feb.	40	.25	10.00	.....	.....	.....	10.00
Mar.	...	...	.....	.....	.....	.....	.....
Apr.	168	.25	42.00	.....	.....	.....	42.00
May	207	.25	51.75	.....	.....	.....	51.75
June	184	.25	46.00	.....	.....	.....	46.00
July	192	.25	48.00	.....	.....	.....	48.00
Aug.	216	.25	54.00	.....	.....	.....	54.00
Sept.	160	.25	40.00	.....	.....	.....	40.00
Oct. 1-23	72	.25	18.00	.....	.....	.....	18.00
Oct. 24-31	32	.30	9.60	.....	.....	.....	9.60
Nov.	10-2/3	.30	3.20	.....	$ .65	$ .65	2.55
Dec.	82¾	.30	24.82	$ .49	3.03	3.52	21.30
1940.							
Jan.	128	.30	38.40	6.45	1.15	7.60	30.80
Feb.	152½	.30	45.75	7.58	1.37	8.95	36.80
	1,156-11/12		$459.52	$14.52	$6.20	$20.72	438.80

Mathews, Everett.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company 1.	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	200	.25	50.00	.....	.....	.....	50.00
Dec.	208	.25	52.00	.....	.....	.....	52.00
1939.							
Jan.	208	.25	52.00	.....	.....	.....	52.00
Feb.	208	.25	52.00	.....	.....	.....	52.00
Mar.	224	.25	56.00	.....	.....	.....	56.00
Apr.	216	.25	54.00	.....	.....	.....	54.00
May	232	.25	58.00	.....	.....	.....	58.00
June	224	.25	56.00	.....	.....	.....	56.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.....	$3.39	$3.39	15.81
Nov.	224	.30	67.20	$2.22	4.58	6.80	60.40
Dec.	232	.30	69.60	5.03	1.91	6.94	62.66

1940.							
Jan.	226¼	.30	67.88	9.09	2.04	11.13	56.75
Feb.	216	.30	64.80	8.85	1.94	10.79	54.01
Mar. 1-6	28	.30	8.40	.....	.....	1.30	7.10
	3,670¼		967.08	$25.19	13.86	$40.35	$926.73

Southern, Frank.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	224	.25	56.00	.....	.....	.....	56.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	216	.25	54.00	.....	.....	.....	54.00
May	232	.25	58.00	.....	.....	.....	58.00
June	216	.25	54.00	.....	.....	.....	54.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	232	.25	58.00	.....	.....	.....	58.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	216	.25	54.00	.....	.....	.....	54.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$1.44	$1.44	17.76
Nov.	225	.30	67.50	$3.24	6.54	9.78	57.72
Dec.	242¾	.30	72.83	4.48	2.00	6.48	66.35
1940.							
Jan.	224	.30	67.20	6.05	2.02	8.07	59.13
Feb.	208	.30	62.40	7.93	1.87	9.80	52.60
Mar 1-6	40	.30	12.00	.....	.....	1.60	10.40
	3,771¾		993.13	$21.70	$13.87	$37.17	$955.96

274

Mr. Flanagan:

Yes, I think we have a brief prepared; I do not know how Your Honor prefers to handle the matter. We have a brief that we have gone into and done a great deal of work on.

The Court:

262 Mr. Flanagan:

I think we are about to the end of this, if Your Honor please, if you will give me a minute to check up. I think we have got it all in.

The Plaintiff rests.

The Court:

All right.

Mr. Payne:

The defendant rests, except we offer in evidence the stipulation too.

The Court:

Do you want to argue the case, gentlemen?

About how long do you want to argue it?

Mr. Flanagan:

I would say it would take an hour.

The Court:

An hour on the side, all right; is that satisfactory to the other side?

Mr. Payne:

I think that is satisfactory.

The Court:

Suppose you go ahead, Mr. Flanagan, and we will work for twenty minutes longer if you like.

Mr. Flanagan:

Mr. Franey will present the first part of our argument.

263 ORAL OPINION.

The Court:

The facts here disclose that for more than thirteen years prior to October, 1938, these men, as well as other men had been working on a tip basis, that is, they were being paid for their labor at the Union Terminal, the defendant's place of business, by tips that the public gave.

In June, 1938, the Fair Labor Standards Act was passed which fixed a minimum wage of twenty-five cents per hour for the first year. That statute became effective, as I recall, one hundred and twenty days after its final passage, which made it operative on October 24, 1938.

On October 22, 1938, the defendant, through its general manager at Dallas, notified each of the Red Caps, who are operating through the plaintiff here, that the defendant claimed that that act was applicable to them, and in order to comply with the provisions they should thereafter consider that the tips which they received from the public, and which had theretofore remunerated those red caps for work which they were doing for the defendant, would be used in part to pay them the minimum wage of twenty-five cents per hour. That if such tips did not amount to that much, that, then and in that event, the defendant would give them a sufficient amount to equal that legal requirement.

That letter was an offer of a contract of employment, and when it was received by the employee, that
264 employee had a reasonable time in which to answer it and let it be known whether or not he would agree to that new arrangement. Then, two days after the receipt of the letter, they notified the defendant that they would not agree to it. That they recognized the law as binding upon the defendant and upon themselves, and that they expected to follow its provisions, or words to that effect.

There was, therefore, no meeting of the minds of the defendant and its employees. There can be no contract under such a setting. That the minds had not met is further evidenced by the signal record evidenced in Article 16 of their agreement of January 1, 1940, where they again show that the matter was an open question. Also in December, 1938 a letter of the defendant shows its openness.

It is all beside the question to talk about being fifty for every one to take their places if they were let out. It is all beside the question to mention color. The law says nothing about color. The law says nothing about waiting unemployed to take the place of employees. The law says that every employer Shall pay every employee twenty-five cents an hour as a minimum wage.

I can hardly believe that a Congress, thoroughly familiar with the system of tipping in America, should in-
265 clude in the act the use of houses, and so forth, and leave out the word "tip", if they intended to permit the employer to get around the payment of this minimum wage by saying that the employee was receiving tips. I think it is a very wise system that a minimum wage only fixes the minimum and the maximum may be as much more as the employee can satisfactorily earn, to say otherwise would be quite unwise, it seems to me.

I would be a very poor judge, I think, to talk about the wisdom of legislation. No Court has anything to do with that. That is the business of the legislature—the business of the law-making body—and if these laws result in men, who have been making a fair living, losing their position, it is not the business of the Court. If and when the public finds out that the red caps are being paid by them, and that they are really employees of the Union Terminal Company, or the Railways, and, therefore ceases to pay the redcap anything, and thereby the railway companies cannot afford to keep them, that would be too bad, of course, for the redcap. That is a matter for the legislative branch of our government and not for the judiciary. The Court, I am sure, as many other citizens, feels quite seriously the trend of such legislation, but be that as it may, a Court that is not big enough to rise above his own feelings as to what a law should be, has no business to sit on the bench.

Sub-division M of Section 203, provides, "The
266 wage paid to any employee includes the reasonable cost determined by the administrator, or employer, of furnishing such employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employee."

That is the section of the law, I referred to awhile ago, as being of such a nature that had the Congress intended to liken it to tips, it would have said so.

I also call attention to the fact that section 206 provides what we already know, of course, and what has been referred to here, "that every employer shall pay to each of his employees who is engaged in commerce, or in the production of goods for commerce," and so forth, "the following wages." Section 215 provides certain prohibitive

acts, among which is transporting or offering for transportation, delivering articles by transportation in interstate commerce", and so forth, and this subdivision under that head enumerating a number of prohibited acts.

Section 216 provides that any person who willfully violates any provision of Section 215 shall, upon conviction thereof, be subject to a fine of not more than ten thousand dollars, or to imprisonment of not more than six months. Any employer who violates the provi-
267 sions of Section 206 or 207, of this chapter shall be liable to the employee affected to the amount of their minimum wages, and so forth.

So that one would be drifting without an excuse to seek to attempt to read into this statute something that is not in it. There is no ground for construction. It is plain, and says what shall be done and what shall not be done.

FINDINGS OF FACT

1.

I find that these plaintiffs had, for many years, more than thirteen, prior to October 24, 1938, been working for the defendant were paid by tips received from the public, and that they had received no remuneration from their employer.

2.

I find that the Union Terminal Company was employer of these redcaps at that time, and ever since.

3.

I find that these redcaps were engaged in interstate commerce.

I find that the redcaps and their employer, made no other contract on October 22, 1938, and have not made any since then. That neither the redcaps nor their employer saw fit to sever their former connections upon the expression of the views of each, as to the applicability of the Fair Labor Standards Act of 1938. That notwithstanding the expression of such views they continued to function together, and continued to recognize that the question of tips and wages was an open one between them.

268

CONCLUSIONS OF LAW.

As a conclusion of law, I find, that the plaintiff must recover. That such recovery shall be the unpaid amount, or amounts, due each employee by the employer. That the amounts paid, as pleaded by the plaintiff and agreed to by the defendant, in the stipulation and pleadings, are to be deducted from any recovery in this judgment that shall be had for these men.

That such payment shall include, of course, the taxes that have been mentioned in argument and in the pleadings.

I find that to that amount shall be added an equal amount of the net portion as liquidated damages in favor of each.

I find a fee of $500.00, which I think is sufficient compensation for the plaintiffs' attorneys in this case, and the judgment shall include that.

The judgment, of course, will be written by the plaintiffs to be ok'd by Mr. Payne, or Mr. Robertson, or Mr. Hodges, as to form, saving such exceptions as they may wish.

The Court:

I shall later write a written opinion in accordance with what I have here said.

269 WRITTEN OPINION.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, General Chairman Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, duly authorized representative of James Foster, et al, plaintiff,

vs. Civil Action No. 248.

The Union Terminal Company, Defendant.

Suit under Fair Standards Wage Act.

Charles M. Hay, S. D. Flanagan, Edwin R. Franey, all of St. Louis, Missouri, and W. T. Savage of Dallas, Texas, for the plaintiff.

Robertson, Leachman, Payne, Gardere & Lancaster, Dallas, Texas, for the defendant.

270 The plaintiff, as agent and representative of forty-five redcaps, employees of the defendant, brings this suit for the minimum wages provided under the Act of June 25th, 1938. Sec. 216, sub-division (b).

He alleges that the defendant is a corporation existing by virtue of the laws of the State of Texas, and that it maintains and operates a railroad terminal, and terminal facilities, in the city of Dallas, used and necessary in the transportation of persons and property in interstate commerce.

That the redcaps, who are specifically named, and for whom he appears, in the capacity aforesaid, were employed by the defendant to handle hand-baggage, and traveling effects of passengers, and otherwise to assist passengers in their passage through said terminal. That substantially all the passengers so assisted were in transit to and among the several states of the union. That said employees were employed in interstate commerce, and their services were an essential part of the transportation of passengers and property among the said several states.

That under Section 6 of the Fair Labor Standards Act of 1938, 29 U. S. C. A. 206, it was required to pay to each of the said employees, wages of not less than twenty-five cents an hour from October 24th, 1938 to October 23rd, 1939, and not less than thirty cents an hour from
271 and after October 24th, 1939. That nothwithstanding such legal requirement it has failed and refused to pay the employees said minimum wage to the date of the filing of the suit, but has paid said employees only a small portion thereof.

It then sets out the exact number of hours that each employee worked at twenty-five cents, and the exact number of hours at thirty cents, showing the total wages earned; the exact amount paid to each employee and the balance due each; the total of such balance due, being $38,626.99.

He then alleges that the amount of $38,626.99, so made up of the items mentioned, is the amount that was received

in tips by the said redcaps from passengers at the defendant's terminal during the specified period.

He claims that the amount so paid by tips from passengers has never been paid by the defendant, and sues for that sum, plus the additional amount stipulated by the statute, as liquidated damages, and for the allowance by the Court of a reasonable attorney's fee.

The pleading of the defendant, the stipulations of the parties, and the testimony introduced, simplify the issues.

Those issues are: (a) whether the redcaps were engaged in interstate commerce; (b) whether they were employees of the defendant; (c) whether, having received tips from passengers, in the exact unpaid amount, such
272 tips may be considered, under the law, as having been paid in wages.

At argument, it was, and is now, conceded by the defendant, that the redcaps were, in truth, its employees. Such fact is clearly shown by its treatment of them, its issuance of passes to them, its rules for their guidance, its requiring them to handle bags and passengers regardless of whether they were paid therefor, by the owners of such bags, or by such passengers, by the furnishing to them of checks which they used on baggage, and by the fact that the defendant hired and discharged them, and otherwise exerted a supervision over them which clearly demonstrated the status of employer and employee. It will be borne in mind that sub-division (g) of Section 203 of the Act, defines "employ," to include, "to suffer, or, to permit to work," while sub-division (e) of the same section says that "employee" includes any individual employed by an employer.

The next issue is equally simple. Paragraph (b) of Section 203, provides that "commerce," "means trade, commerce, transportation, transmission, or, communication among the several states, or, from any state to any place outside thereof."

The stipulation and testimony indicate that about one-half of the passengers served by the redcaps are interstate; that a substantial part of the passengers
273 are interstate; that incoming trains from other states stop at the station, and the redcaps are required to unload the baggage of the passengers thereon, from the platform of the cars and place it on the station platform. They then carry it for those passengers from the station platform to the street. This, they are required to do, whether they receive tips or not. If a person is old, or, sick, or, crippled, and needs a wheel chair, such chair is furnished by the defendant and the redcap wheels the chair for the use of the person, and then wheels the person in the chair either to the place of embarking, or, to the place of disembarking from and to the street, whether paid by such person or not.

The railways which own the defendant's stock and use the terminal, are, the Texas and Pacific; the Missouri, Kansas and Texas; the Gulf, Colorado and Santa Fe; the Chicago, Rock Island and Pacific; the St. Louis and Southwestern; the Texas and New Orleans; the Frisco; and the Fort Worth and Denver. Each of these roads run from points in Texas to points outside of Texas, or have connection to and from outside the state. Their trains, so constituted, come into the terminal. The defendant has ticket offices, baggage facilities, and all of the machinery necessary for the delivery onto the trains and off of the trains, of persons and baggage so routed and traveling.

The rule which is now recognized, and which
274 has been reiterated, is, that the test of whether an employee is engaged in interstate commerce, is whether he was so engaged, or in work so closely related to such transportation as to be practically a part of it; whether he facilitates interstate commerce. Chicago and Northwestern Ry. Co. vs. Bolee, 284 U. S. 74; Kinzell vs. Chicago, M. & St. P. Ry. Co., 250 U. S. 130; L. & N. vs. Jollys Administratrix, 23 S. W. (2d) 564; Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498; Spaw vs. Kansas City Terminal Ry. Co., 201 S. W. 927; Gus Mayer Co. vs. L. & N., 153 So. 249; Treadway vs. Terminal, 84 S. W. (2d) 143, and 136 S. W. (2d) 401; B. & N. vs. Burtch, 263 U. S. 540; Pudget Sound Stevedoring Co. vs. State Tax Commission, 302 U. S. 90; Santa Cruz Fruit Packing Co. vs. National Labor Relations Board, 303 U. S. 453; National Labor Relations Board vs. Fainbott, 306 U. S. 601.

There is nothing in the Pennsylvania Ry. Co. vs. Knight, 192 U. S. 21 which, upon close scrutiny, is contrary to this formidable line of recent authorities. The activities there, and the instruments, ante and post, interstate journeys, were on a different basis and in a different relation to the railway company to that disclosed in this case.

The third question is somewhat more difficult. It is more difficult because the penalty of the statute
275 makes the burden heavy on the erring employer. Careful counsel have called the Court's attention to the fact, as disclosed by the stipulation and testimony, that the redcaps who are suing here, have already received a little more than they were receiving before the law was passed. Any such considerations are not for Courts. If a law is plain, unambiguous and constitutional, the Court has nothing to do but to speak its enforcement, if and when called upon to act under it. This Act has

been found to be constitutional. Opp Cotton Mills vs. Administrator of Wage and Hour Division, Circuit Court of Appeals, Fifth Circuit, 111 Fed. (2d) 23; citing several Supreme Court cases. It was written in the interest of the employee. Its philosophy is not to limit a recovery to the minimum wage, but to guarantee such minimum wage. If betterments to the minimum wage are secured, there is nothing in the law that would strip them from the employee.

The payment of tips by the public, to the employee of another, is a gift to that employee and in the absence of any contract between the employee and employer that such tips shall be the property of the employer, they remain the property of the employee. A gratuity by the public to the employee of an employer cannot be a compliance with a plainly worded statute which requires the employer to pay the employee a certain sum.

276 A gift by an outsider to a servant does not discharge the debt of the master to the servant. Assuming that a master and servant may contract, which is not decided, that gifts received by servant shall be the property of the master, and used by both to liquidate part of what the master owes the servant, is not present in this case. There is no such agreement in this case.

On October 22nd, 1938, the defendant wrote a letter to each of the redcaps in its employ, advising them that on October 24th, the Fair Labor Standards Act would become effective, and that such tips as they received could be retained by them, and the defendant would make up the deficiency if such tips did not aggregate the minimum legal wage. Two days later, the redcaps replied, through their representative, that they could not agree to that procedure and that they intended to assert their rights under the law. Nothing was done by either side. Each con-

tinued to function as employee and employer. The status remained the same. No one was discharged and no one quit.

In December following, the defendant recognized by letter that the question of tips was an open question between it and the redcaps.

On January 1st, 1940, in a working agreement, which has been introduced in evidence, it was again
277 recognized that the question of tips was an open one, and that it would be decided by the Courts, and if decided against the defendant, it would respond.

Therefore, there was no meeting of the minds on the so-called new contract. For more than thirteen years they had been working together as heretofore indicated; the redcaps being paid entirely by tips which they received from the public, when they were paid at all. That arrangement could not be optionally terminated by one party without the consent and agreement of the other. When the offer to terminate it was made by the employer by letter, a reasonable time to accept, or, reject, was granted by the law. The answer coming within two days, it would appear that it was rejected within a reasonable time. The parties continued to act as they had theretofore acted.

The case Shuppan vs. Peoria Ry. Terminal Co., 30 F (2d) 569, can hardly be construed as persuasive in the present case. That was a short line which became financially involved, and a notice that the employees must accept a cut in wages was given. That cut was refused. Thereafter, the general manager posted a bulletin, announcing that beginning at a certain period, "you will receive on each pay-day, your proportionate share of the current income of the company; after allowing for the

payment of current bills for fuel, current sup-
278 plies, etc., and that the amount that you receive on each pay-day will constitute your full and final compensation for the period covered by such pay-day."

Again, the employees wrote that they expected the wages fixed by the United States Labor Board, and that they would not accept a lesser rate of pay. The company then began to pay the employees as announced in the bulletin. The paying checks were stamped, "payment in full for services in month of .....," or, "in full for services to date." Protests were made by the employee as the check was received. This continued for about a year and a half, and sometime later, when the road was in the hands of a receiver, claims were filed by the employees for the alleged deficiency in wages.

Under that situation, the Court said, "Clearly there was no formal contract betweeen the company and the employees that they would accept a smaller wage than they had been receiving. Looking, however, to the conduct of the parties, the conclusion is inescapable that they did so contract."

The facts here disclose, as already indicated, that there was a meeting of the minds and that such openness was disclosed by the defendant's recognition of the lack of an agreement in the December following October of 1938, and again in the working agreement between the parties on January 1, 1940.

There is also a statement in the opinion which
279 shows its inapplicability to the law, namely, "only the company can fix the wages of those who were willing to work for it." Under the present situation, the Congress has declared what the minimum wage shall be, and to that extent has superseded the right of employer

and employee to fix another, or, a different amount, unless the amount be in excess of the minimum. Again, the statement that if either the employer, or, employee, were dissatisfied with the terms of employment, one so dissatisfied could terminate the relationship. Of course, that is academic, but that liberty, which was once thought academic is now superseded by the language of this Act. The reasoner would not be considered even bold who states that an employee may agree to work for an employer for twenty cents an hour, and after such agreement bring suit and recover an amount equal to the legal minimum fixed by the Act.

The contract between the employee and his employer is worthless, so far as minimums are concerned, if such minimum is below the legal minimum, and if the work is the work described in the Act.

There has been a refinement of argument, pro and con, with reference to wages and tipping. An employee who receives tips from the public, and pays them to his employer in the absence of any contract, may recover them. Zappas vs. Roumelioute, 156 Iowa 709; Polites vs. Barlin, 149 Ky. 376.

Wages is the reward paid for labor; a compensation given to a hired person for his or her services. See in re Gurewitz, 121 F. 982. Wage is that which is paid for work, or, service, especially for work of a manual, mechanical, or, menial kind. It differs from salary. Subdivision (m) of Section 203 of the Act, provides that wages paid to any employee, includes the reasonable cost, as determined by the administrator, to the employer of furnishing employee with board, lodging, or, other facilities, if such board, lodging, or, other facilities are customarily furnished by such employer to his employee. The Congress thought, therefore, that that could be included as a

part of the wage which it described, if and when furnished by the employer. It would be remarkable to conclude that a congressman in 1938, was not familiar with the tipping practice. The Congress did not put into the Act anything else under the head of wages which might be construed into an inclusion of tips, which might be received by an employee, as a deduction from the legal wage provided for.

That tips are figured under the Social Security Act, or, the Compensation Act, in some states, in addition to the paid wage, as the aggregate basis for the determination of
281 benefits that the employee is to receive under those Acts, is no argument for including in a clear law the thought that it was intended that if an employee received a tip, while working under the Fair Standards Labor Act, his employer could deduct that amount from the minimum wage which he was bounden to pay under the law. Such a construction would be abortive and destructive. The Act uses the phrase, "shall pay" in describing the duty of the employer.

The Act also, in paragraph 216, carries criminal penalties as well as civil penalties. An Act so worded cannot be destroyed by reading into it something that is not justified.

Decree may go for the plaintiff for the amount sued for, plus liquidated damages in that amount, plus $500.00 attorney's fee.

(Signed) WILLIAM H. ATWELL,
United States District Judge.

Dallas, Texas, May 28th, 1940.

283 NOTICE OF APPEAL.

Filed July 22, 1940.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others, Plaintiff,

vs. Civil Action No. 248.

The Union Terminal Company, a Corporation, Defendant.

Notice Is Hereby Given that The Union Terminal Company, a corporation, defendant in the above styled and numbered cause, does hereby appeal to the Circuit Court of Appeals of the United States for the Fifth Circuit from the final judgment entered in this action on May 28th A. D. 1940.

ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for The Union
Terminal Company.

505 Republic Bank Building,
Dallas, Texas.

Copy of this notice has been mailed to Mr. W. T. Savage and Messrs. Hay & Flanagan, attorneys for plaintiff.

CONCISE STATEMENT OF THE POINTS ON WHICH THE UNION TERMINAL COMPANY, APPELLANT, INTENDS TO RELY ON APPEAL.

284 Filed July 22, 1940.

(Title Omitted.)

To A. J. Pickett, Plaintiff, W. T. Savage and Messrs. Hay and Flanagan, Attorneys for Plaintiff:

You are hereby notified that a concise statement of the points on which The Union Terminal Company, appellant, intends to rely on appeal of this cause is as follows:

I.

The Court erred in holding that this defendant employer's notice of October 22, 1938, given to each of its Red Cap employees setting out the terms and conditions of their future employment did not bind the latter in law by their conduct in continuing in service, collecting, reporting and retaining tips, and accepting payment of
285 the difference between the income received from tips and the minimum wage requirements from the defendant, because such clearly was a notice specifying conditions of future employment which in law was binding upon those employees thereafter continuing in service and accepting wages paid and based thereon, and said Red Caps rejected their only alternative of exercising their right to quit work if dissatisfied with the terms of future employment prescribed by the employer in said notice.

II.

The Court erred in holding that the letter of protest written to defendant employer on October 24, 1938, by A.

J. Pickett had the effect of depriving defendant of its right, exercised in its October 22nd notice, of prescribing the terms of future employment for its employees; because the Red Caps, by continuing in the service, accepted the conditions of such notice, and such conduct had the legal effect of contradicting anything said or implied in said protest letter; and further because, in any event, said protest letter does not purport to be or does not amount to a refusal to be bound by the terms imposed upon them in their future employment, but is merely a statement of a legal opinion that the legal effect of the method prescribed is not in compliance with the Fair Labor Standards Law.

III.

The Court erred in failing to hold that, regardless of whether or not there was an agreement to the terms of the October 22nd notice, the defendant complied with the Fair Labor Standards Law; because if, as held by the Court, the Red Caps are defendant's employees it must follow that the service rendered the patrons is furnished by the employer defendant; that, unlike gratuities given over and above the price of the service, the tips were given in payment of the service rendered by defendant
286 through the Red Caps, hence such payments for such service belonged in law to defendant, the one furnishing the service, and it had the right and power to control and dispose of such income belonging to it, which right and power it exercised by applying same on wages. It was unnecessary for it to follow the formality or mechanics of having such payments manually delivered to defendant and then manually delivering it back to the Red Caps as wages, as the method prescribed and followed had that legal effect.

IV.

The Court erred in rendering judgment for the plaintiff herein for wages in the sum of $38,626.99 because the plaintiff wholly failed to discharge the burden placed on him by law of alleging and proving that the $38,626.99, admittedly received by the Red Caps during the period, was paid to the Red Caps as a gratuity and was an amount over and above the amount paid by such patrons to and received by the company as compensation for the service rendered by the company to the patron through the Red Cap.

V.

The Court erred in holding that each of the Red Caps for whom this action is brought, was "engaged in commerce"; because the service performed by said Red Caps is purely local, forming no part of any interstate commerce and on the contrary is independently arranged for, directed and compensated for, not included in the price of ticket or arranged with and as a part of the interstate journey.

VI.

That under the pleadings and evidence, even though it be found that there was no contract making the retention of tips a payment of wages and that in the absence of such contract the tips collected and retained by the Red Caps were not wages paid by them, still it appears as a matter of law that said Red Caps, while acting in the
287 course of their employment for defendant collected payments made by the defendant's patrons in the form of tips for services rendered to the patrons by the defendant through the Red Caps, which payments as a matter of law belong to defendant and which exactly offset any claim for wages by plaintiff, so that a new trial

should therefore be granted. In the alternative, if the Court holds that such offset should be formally set up by way of counterclaim, defendant asks the Court to grant a new trial herein and allow a trial on the issues raised by defendant's counterclaim in accordance with defendant's application for leave to file and be heard on such counterclaim.

VIII.

Without waiving its position that no recovery should have been allowed but still insisting on same, defendant submits that in any event the Court erred in rendering judgment for "liquidated damages" in the amount of $38,626.90 over and above what was found by the Court to be unpaid minimum wages, because the evidence shows that defendant in good faith pursued a plan which it reasonably believed to be in compliance with the Fair Labor Standards Act, and in the defense of this action was in good faith litigating and seeking a judicial determination of a bona fide existing controversy as to whether or not there were due from it any "unpaid minimum wages" under the Fair Labor Standards Act, and should not in such circumstances be subject to the harsh penalties of the so-called "liquidated damages".

Respectfully submitted,
ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

A copy of this instrument has been mailed to W. T. Savage and Messrs. Hay and Flanagan.

288 SUPERSEDEAS APPEAL BOND.

Filed July 22, 1940.

(Title Omitted.)

Know All Men By These Presents: Whereas in the above entitled and numbered cause in the District Court of the United States for the Northern District of Texas, Dallas Division, at a regular term of Court, to-wit: on or about the 28th day of May, A. D. 1940, the plaintiff, A. J. Pickett, recovered a judgment for and on behalf of James Foster, Isaac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingsworth, J. T. Rurpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Charles Langston, Charles Muckelroy, Felix Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, William McMurray, Sam H. Williams, Earnest Amos, Harry Barton, Adolphus Wells, Alphonso Connor, Lawrence McNeil, Cornelius Busby, Columbus Jackson, Everett Mathews, Frank Southern, Scott Campbell, H. N. Barton, Silas Kelton, Frank Bailey and Russell Elston, as provided in said judgment, against the defendant, The Union Terminal Company, for the total sum of Seventy-Seven Thousand Seven Hundred Fifty-Three Dollars and Ninety-Eight Cents ($77,753.98), and all costs of suit, from which judgment defendant, The Union Terminal Company, desires to take an appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and desires a stay on appeal:

289 Now, therefore, we, The Union Terminal Company, a corporation, as principal and United

States Fidelity and Guaranty Company, a corporation, as surety, acknowledge ourselves bound to pay to A. J. Pickett, plaintiff, and the above named persons, as their interests appear, the sum of One Hundred Thousand Dollars ($100,000.00), conditioned that the defendant, The Union Terminal Company, shall prosecute its appeal to final effect and shall satisfy the said judgment in full together with costs, interest and damages for delay, if any, if for any reason the appeal is dismissed or if the said judgment is affirmed, and shall satisfy in full such modifications of the judgment and such costs, interest, and damages as the appellate Court may adjudge and award, then the above obligation to be void; else to remain in full force and virtue.

Wherefore we hereunto set our hands this the 18th day of June, A. D. 1940.

THE UNION TERMINAL COMPANY,
By JOHN C. ROBERTSON,
ROBERT G. PAYNE,
GUS M. HODGES,
Its Attorneys, Principal.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By H. R. WARREN,
(Corp. Seal) Attorney in Fact, Surety.

The amount of the Supersedeas Bond herein is fixed by the Court at the sum of One Hundred Thousand Dollars ($100,000.00) and the foregoing bond in said amount is hereby approved and ordered filed, this the 22nd day of July, A. D. 1940.

WM. H. ATWELL,
Judge of the United States District Court for the Northern District of Texas, Dallas Division.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

290 Filed July 22, 1940.

(Title Omitted.)

To A. J. Pickett, Plaintiff, W. T. Savage, and Messrs. Hay and Flanagan, Attorneys for Plaintiff, and to the Clerk of said Court:

An appeal having been taken herein by The Union Terminal Company to the United States Circuit Court of Appeals for the Fifth Circuit, The Union Terminal Company, appellant, does hereby make designation of the portions of the records, proceedings and evidence to be contained in the record on appeal as follows, to-wit:

A full and complete record of all proceedings herein, including, but not limited to, the reporter's complete transcript of the evidence and proceedings including testimony of witnesses in questions and answers form as filed herewith, all pleadings, motions, orders, judgments and other papers filed herein.

Respectfully submitted,

291 ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for The Union Terminal Company.

505 Republic Bank Building,
Dallas, Texas.

A copy of the foregoing Designation of Contents of Record has been mailed to W. T. Savage and Messrs. Hay and Flanagan, attorneys for the plaintiff.

292 CLERK'S CERTIFICATE.

I, GEORGE W. PARKER, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that the foregoing is a true and correct transcript of the record, and all proceedings in cause No. 248-Civil, Wherein, A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster, and Others, is Plaintiff, and The Union Terminal Company, a corporation, is Defendant, as fully as the same now remain on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said Court at Dallas, Texas, this the 26th day of July, A. D. 1940.

GEORGE W. PARKER,
(Seal) Clerk United States District Court, Northern District of Texas, at Dallas.
By MARY COUGER,
Deputy.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 5th, 1941

No. 9612

UNION TERMINAL COMPANY,

versus

A. J. PICKETT

On this day this cause was called, and, after argument by Robert G. Payne, Esq., for appellant, and Chas. M. Hay, Esq., and Edwin D. Franey, Esq., for appellee, was submitted to the Court.

F

OPINION OF THE COURT AND DISSENTING OPINION OF HOLMES, CIRCUIT JUDGE—Filed March 4, 1941

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 9612

UNION TERMINAL COMPANY,
Appellant,

versus

A. J. PICKETT,
Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

(March 4, 1941)

Before Foster, Sibley, and Holmes, Circuit Judges

SIBLEY, Circuit Judge: This case is similar to Williams vs. Jacksonville Terminal Company, this day decided, . . . Fed. (2) . . . except that on a trial without a jury the district court reached an opposite conclusion and rendered a large judgment for wages and damages against Union Terminal Company. The facts are about the same and need not be restated. The applicable law is the same and requires a like decision. It does not appear that any of the monies collected and retained by the red caps were

personal gifts and not compensation for the service which the Terminal Company hired them to perform; so that no contract was necessary to make them the money of the Company. The proceeds of the very thing the employee is hired to do belongs as a matter of law to the employer, even though it be so personal a thing as the brain child of an inventor. Standard Parts Co. vs. Peck, 264 U. S. 52. Though the red caps did not agree to the plan stated in the notice to them, they did continue at work and collected money for their services and accounted for it as required. The law had intervened to make the Company owe them a stated wage for those services, and in consequence to deprive them of the tips which previously were their compensation.

The argument that the former arrangement, though not a formal collective agreement, ought to be held unchangeable by the employer alone, cannot be sustained; both because there was no collective agreement that the tips should belong to the red caps, and because a collective agreement would not avail against changes wrought by a statute.

Now do we think it lies in the red cap's mouth to say that the whole idea of letting the passenger fix the amount of compensation for porter service is repugnant to the Interstate Commerce Act as discriminating in favor of the passenger who pays less and against one who pays more. But if they can urge it, and if this is a transportation service requiring uniformity of charge, and if a court rather than the Interstate Commerce Commission may deal with it, the wrong would not be righted by giving the red cap this money and double wages besides.

Nothing specially urged in this case differentiates it from that of the Jacksonville Terminal Company. The judgment is reversed and the cause remanded for further consistent proceedings.

HOLMES, Circuit Judge, dissenting:

I think the burden of proving that tips were not gifts of gratuities is wrongly placed upon the appellees in the majority opinion. In the absence of such proof, the word should be given its usual and ordinary meaning.

I dissent for the above and the further reasons stated by me in the case of Williams, Individually, etc., et al., v. Jacksonville Terminal Company, No. 9754, this day decided.

JUDGMENT

Extract from the Minutes of March 4th, 1941

No. 9612

UNION TERMINAL COMPANY,

versus

A. J. PICKETT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further consistent proceedings;

It is further ordered, adjudged and decreed that the appellee, A. J. Pickett, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Holmes, Circuit Judge, dissents."

ORDER DENYING REHEARING

Extract from the Minutes of April 2nd, 1941

No. 9612

UNION TERMINAL COMPANY,

versus

A. J. PICKETT

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Holmes, Circuit Judge, dissents."

MOTION AND ORDER STAYING MANDATE—Filed April 7th, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9612

THE UNION TERMINAL COMPANY, a Corporation, Appellant,

vs.

A. J. PICKETT, Appellee

APPLICATION FOR STAY OF MANDATE

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now the appellee, A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, duly authorized representative of James Foster and others, and respectfully represents that he desires to file in the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this Honorable Court rendered in this cause reversing the judgment of the District Court of

the United States for the Northern District of Texas and remanding this cause.

Wherefore, appellee respectfully applies for an order of this Honorable Court staying the mandate herein for a reasonable time in order to allow appellee an opportunity to prepare and present his petition for a writ of certiorari to the Supreme Court of the United States.

(Signed) Charles M. Hay, S. D. Flanagan, E. D. Franey, Attorneys for Appellee.

A copy of the foregoing application for stay of mandate was mailed to Messrs. Robert G. Payne, Neth L. Leachman, John C. Robertson, Roberston, Leachman, Payne, Gardere and Lancaster, Dallas, Texas, attorneys for appellant, this 4th day of April, 1941.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9612

UNION TERMINAL COMPANY, Appellant,

versus.

A. J. PICKETT, Appellee

On Consideration of the Application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall

issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 7th day of April, 1941.

(Signed) Rufus E. Foster, United States Circuit Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 1023

ORDER ALLOWING CERTIORARI—October 13, 1941

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

A petition for rehearing having been submitted in this case,

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.